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WOOD'S

PRACTICE EVIDENCE,

For Ready Use in the Trial of Causes.

By H. G. WOOD,

AUTHOR OF

"FIRE INSURANCE," "LANDLORD AND TENANT,"
"STATUTE OF FRAUDS," ETC., ETC.

1886:
BANKS & BROTHERS, PUBLISHERS,
473 AND 475 BROADWAY, ALBANY.
144 NASSAU STREET, NEW YORK.

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1886

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PREFACE.

This work, upon which I have been engaged at odd intervals for the last eight years, is intended for practical use in the trial of causes—a sort of "handy" book for reference in the multifarious questions that arise in the trial of causes, as to the admissibility of certain classes of evidence and to the settlement of which the elementary rules do not always afford a ready solution. As far as practicable this work is intended to remedy the inconvenience resulting from this condition. The work is not intended as an elementary treatise, nor is it a mere digest, but may be said to be intermediate between the two. It gives the gist of the leading cases, whose doctrine is well and firmly established both as to the rules and the exceptions thereto, and I believe will be found to be reliable. There is no field of the law in which the general rules are more firmly established than in that relating to the law of evidence; but at the same time, the *exceptions* to these rules are so numerous that there is no department of the law in which more difficulty is experienced in ascertaining where the rules apply than in this. I have endeavored in a large measure to overcome this difficulty, and have drawn largely from the cases and the text-books—especially the English text-books—to this end. Of course I have not been able to cover or meet every possible question, but have gone as far as the best class of cases (English and American) warrant, in solving them. The work covers a field which is not, except to a limited extent, covered by the elementary or other text-books, and I trust will be found useful as a guide, and as an authority, in the trial of causes in which these questions arise. The index is very full, and will be found to be a "*key*" to the points covered.

New York, *March* 22, 1886.

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EVIDENCE.

CHAPTER I.

BEST AND SECONDARY EVIDENCE.

SECTION.

1. Primary Evidence, what is.
2. Rule as to merely Collateral Matters.
3. Rule as to Immovables, etc.
4. Application of the Rule.
5. Admissions of a Party dispense with the Rule, when.
6. Copies not admissible, unless.
7. Secondary Evidence, what is; admissible when.
8. Loss of Paper, how established.
9. Search, Sufficiency of.
10. When Paper is in Possession of the Adverse Party. Rule.
11. When Notice to Produce, is unnecessary.
12. Effect of Notice to Produce Papers.
13. How the Contents of Writings may be proved.

Sec. 1. Primary Evidence, what is.

It is a general rule, universal in its application, and one highly essential to the pure administration of justice, that *the best, or highest kind of evidence which the nature of the case admits of, must be given*, and evidence which presupposes better evidence behind, in the party's possession or power, is secondary evidence.[1] Thus, where a contract has

[1] Taylor *v.* Rugg, 1 Pet. (U. S.) 391; Colton *v.* Campbell, 3 Tex. 493; Newsom *v.* Jackson, 26 Ga. 241; Hartt *v.* Moulton, 21 N. H. 586; The Queen's Case, 2 Br. B. 287; Union Bank *v.* Ellis, 3 La. An. 188; Greely *v.* Quimby, 22 N. H. 335; Morton *v.* White, 16 Me. 53. Primary evidence, as stated in the text, is that which the law recognizes as affording the greatest certainty of the fact in question, and, until it is shown that the production of this class of evidence is out of the power of the party, no other proof of the fact is, in general, admissible. All evidence falling short of this, is secondary, and the question whether evidence is primary or secondary, has reference to the nature

been reduced to writing, the writing is the best evidence of its contents, *and must be produced, unless the party satisfies the court that it has been lost or destroyed, or, without fault on his part, he is unable to produce it.*[1] So where an auctioneer's memorandum of a sale, becomes important, the original memorandum, alone, is sufficient to establish the sale, and a mere copy thereof is not admissible ;[2] so, too, in some of the cases it is held that a copy of a message sent by telegraph is not competent evidence, unless the original dispatch, left at the transmitting office, is shown to have been destroyed or lost,[3] or that the original, and the office from which it was sent, are beyond the jurisdiction of the court.[4] This is upon the grounds that the message *as written*, is the original, while that received is merely a copy and therefore without any of

of the case, in the abstract, and not to the peculiar circumstances under which the party, in the particular case, may be placed. It is a distinction of law, and not of fact; *referring only to the quality, and not to the strength of the proof,* Richardson *v.* Milburn, 17 Md. 67, or, as was said in the case last cited, *to its grade and not to its conclusiveness.*

[1] Felton *v.* McDonald, 4 Dev. (N. C.) L. 406; Wilson *v.* Young, 2 Cr. (U. S. C. C.) 33; Williams *v.* Jones, 12 Ind. 561; Brewton *v.* Driver, 13 Ala. 826; Fitzgerald *v.* Adams, 9 Ga. 471. Where a contract has been executed in duplicate, each part is an original. Totten *v.* Buey, 57 Md. 446. The rule requiring the production of the best evidence, as stated *supra*, excludes only that evidence *which itself indicates the existence of more original sources of information;* and, consequently, where there is no substitution of *inferior* evidence, but only a selection of *weaker*, instead of *stronger* proofs, the rule is not infringed. 1 Phillips on Ev. 418; Taylor on Ev. 281.

[2] Davis *v.* Robertson, Mill (S. C.) Const. 71.

[3] Smith *v.* Easton, 54 Md. 138; 39 Am. Rep. 355. This must be understood, however, as applying only in cases where the telegram is relied upon to sustain the action, or to establish a substantial fact, and in such cases, it is held that even the original is not admissible unless it is proved to have been sent by the party by whom it purports to have been, and this rule has been held to apply where a message has been sent to a party, and a reply purporting to come from him has been received in due course, the courts holding that the same rule in such cases does not apply, as is held in relation to letters received in due course by mail. Hawley *v.* Whipple, 48 N. H. 487. The message must be shown to have been sent by the party from whom it purports to have come, either by proof that it was in his handwriting, or that it was sent by his direction or authority. United States *v.* Babcock, 3 Dill. (U. S. C. C.) 576.

[4] Whilden *v.* Merchant's, &c., Bank, 64 Ala. 1.

the essential elements of primary evidence. But, it is evident that this rule cannot have a general application, as there are instances in which the message *received* must be deemed the original, and the rule relative thereto may be stated as follows: The original message, whatever it may be, must be produced, and *in all cases where the company can be considered the agent of the sender, the message as received, in all questions between the sender and the person receiving it*, is treated as the original.[1] A title by deed must be proved by the production of the deed itself;[2] and generally it may be said that *the contents of a written instrument which is capable of being produced must be proved by the instrument itself, and not by parol evidence.*[3] There are *three* classes of cases to which this rule applies: *First, Those instruments which the law requires to be in writing;*[4] *second, Those contracts which the parties have reduced to writing;* and *third, All other writings, the existence or contents of which are disputed, and which are material either to the issue, or to the credit of a witness.*

When a writing does not fall under either of these heads, there is no ground for its excluding oral evidence; as, if a *written* communication is accompanied by a *verbal* one to the same effect, the verbal communication may be received as independent evidence, but not to prove the contents of the writing, or as a substitute for it. It is upon this ground that the fact of payment may be shown by parol, although a receipt in writing was given;[5] or that a verbal demand for goods may be shown in an action of trover, although a written demand was made at the same time;[6] or that what the

[1] Laviland *v.* Green, 20 Wis. 431; Durkee *v.* Vt. Central R. R. Co., 29 Vt. 127; see also Trevor *v.* Wood, 36 N. Y. 307; Dunning *v.* Roberts, 35 Barb. (N. Y.) 463. See *post*, § , *Telegrams.*

[2] Alivon *v.* Furnival, 1 C., M. & R. 292. So, on reference to a deed or any other *attested* instrument, its due execution must in general be proved, *if questioned*, by the production of the attesting witness, if alive, sane, and within the jurisdiction of the court, and can be found by diligent inquiry. Wright *v.* Tatham, 1 Ad. & El. 21. See *post*, § , *Proof of Attested Instruments.*

[3] The Queen's Case, 2 B. & B. 289; Turner *v.* Singleton, 2 A. K. Mar. (Ky.) 15; Morrill *v.* Otis, 12 N. H. 466.

[4] Fitzgerald *v.* Adams, 9 Ga. 471.

[5] Jacob *v.* Lindsay, 1 East, 460.

[6] Smith *v.* Young, 4 Camp. 439.

testimony given by a witness upon a trial was, may be shown by parol, although the judge or clerk took it down in writing, but which the witness did not sign.[1]

Before a deposition can be admitted in evidence, it must be shown that the party who made it cannot be produced by the party offering it, and that at the time when it was taken a cause therefor, coming within the provision of the statute relating thereto, existed;[2] and in order to render a deposition taken *in perpetuam* admissible, it must be shown that the person making it is dead,[3] because in all cases the *oral evidence* of a witness, given upon the stand, in the presence of the triers, is regarded as of a higher kind than that given by way of deposition.

Sec. 2. Rule as to merely Collateral Matters.

The rule, as stated in reference to the production of written communications or agreements, *has no application when they are merely collateral to the issue.* This is the case when parol evidence relates to matters distinct from a written contract or instrument, although the same fact could be proved or disproved by the writing.[4] Thus, while an action to recover for extra work done under a written contract, *and relating to the matters embraced in the contract*, cannot be maintained without the production of the written contract;[5] *yet if an entirely separate order is given for the extras*, then the production of the written contract is not necessary,[6] and parol evidence of the order and of the performance of the work is primary, because the ground of action does not rest upon the written contract, but upon the implied contract which arises from the order to perform the work. But to

[1] Jeans *v.* Wheeden, 2 M. & R. 486.

[2] Harvard *v.* Maale, 2 H. & J. (Md.) 249; Dunn *v.* Dunn, 11 Mich. 264; Livermore *v.* Eddy, 30 Mo. 547; Wetherell *v.* Patterson, 31 id. 458. In the cases cited from Missouri it was held that where the cause for taking the deposition was, that the witness was about to leave the State, it must be shown by other evidence than that contained in the certificate that the witness is absent from the State at the time of the trial.

[3] Farmer *v.* Gray, 21 Pick. (Mass.) 243.

[4] Shiels *v.* Starks, 14 Ga. 529.

[5] Buxton *v.* Cornish, 12 M. & W. 426; Vincent *v.* Cole, M. & M. 257.

[6] Reed *v.* Batte, M. & M. 84.

make parol evidence admissible in such cases, it must refer to a subject *distinct* from the written contract. Thus, payment of contracts, and of judgments even, may be proved by parol, although there may be written or even record evidence of the fact.[1] So, too, the appointment of an agent may be shown by parol, even though his appointment is in writing;[2] but the extent of his powers, *as conferred by the written appointment*, can only be shown by the production of the writing itself,[3] although it may be shown by parol that he did certain acts as agent which were ratified by his principal, for the purpose of showing that he had authority to do a certain act as such agent.[4] So the fact of birth, marriage, death or burial may be proved by parol, although a narrative or memorandum of the event has been entered in registers which the law requires to be kept.[5] The rule is, that where the narrative of an extrinsic fact has been committed to writing, the fact may nevertheless be proved by parol. Thus, the fact that a receipt for money has been given will not exclude parol proof of its payment.[6] So, where an oral and written notice to the same effect is served

[1] Planters' Bank *v.* Borland, 5 Ala. 531; Kingsbury *v.* Moses, 45 N. H. 222; Keene *v.* Mead, 3 Pit. (U. S.) 7; Page *v.* Einstein, 7 Jones (N. C.) L. 147. *Such evidence is admissible to establish the fact of payment*, but not to show that a receipt was given, or that an indorsement of the amount was made upon a note or upon an execution. French *v.* Frazier, 7 J. J. Mar. (Ky.) 425. So the payment of taxes may be shown by parol, and the production of the record is not necessary. Davis *v.* Hare, 82 Ark. 386; Dennett *v.* Crocker, 8 Me. 239; Adams *v.* Beale, 19 Iowa, 61. Payment may be proved by parol to have been made in promissory notes, without the production of the notes. Daniels *v.* Johnson, 29 Ga. 207.

[2] Whitfield *v.* Brand, 16 M. & W. 282.

[3] PARKE, B., in Whitfield *v.* Brand, *ante*.

[4] Concord *v.* Concord Bank, 16 N. H. 26.

[5] Owings *v.* Wyant, 1 H. & McH. (Md.) 393; Com. *v.* Norcross, 9 Mass. 492; Evans *v.* Morgan, 2 C. & S. 453; Birt *v.* Barlow, 1 Doug. 172; Nixon *v.* Brown, 4 Blackf. (Ind.) 157; Morris *v.* Miller, 1 W. Bl. 632; St. Devereux *v.* Much Dew Church, 1 id. 367. The reason for this is, that the contents of the register is nothing more than a collateral or subsequent memorial of the fact, and forms no part of the fact to be proved, and, while it may be a convenient mode of proof, cannot exclude other evidence. Evans *v.* Morgan, *ante*.

[6] Rambert *v.* Cohen, 4 Esp. 213.

upon a party, the written notice need not be produced, unless the law makes a written notice imperative;[1] and the same is true where there is an oral admission of a debt and a written promise to pay.[2] Where there is a written demise, oral evidence of occupancy by the tenant, under the lease, may be given;[3] but the terms of the tenancy, as the amount of rent, duration of the term, etc., can only be shown by the lease itself.[4] And the same is also true where proof is required to be made as to the person under whom the premises were occupied.[5]

As between third persons and the members of a firm, the fact of partnership may be established by parol, although there exists a deed of partnership.[6] So parol evidence is admissible to show that a person who took the acknowledgment of a deed of real estate, was at the time a justice of the peace, although the certificate does not state the fact,[7] and generally, parol proof is admissible to prove that a person has notoriously acted as a public officer, for the purpose of establishing his official character without producing his commission.[8] Parol evidence is admissible to show at what time a certain railroad train is due at a certain station, although the company has issued a printed time table fixing the time of arrival.[9] So, although a vessel was cleared at

[1] Smith *v.* Young, 1 Camp. 439. And where the notice is merely collateral to the issue, it may be proved by parol, although it was given in writing. Polly *v.* McCall, 1 Ala. Sel. Cas. 246; see also Kelly *v.* Taylor, 23 Cal. 11. This rule rests upon the ground that there are two independent sources of evidence, and therefore that the party may resort to either; but it must be remembered that the rule only permits the party to show what the verbal notice was, and does not permit him to show what the written notice contained.

[2] Singleton *v.* Barrett, 2 C. & S. 369.

[3] Rex *v.* Holy Trinity, 7 B. & C. 611; Guitard *v.* Stoddard, 16 How. (U. S.) 494; Hammon *v.* Sexton, 69 Ind. 37.

[4] Strother *v.* Bau, 5 Bing. 136; Rex *v.* Merthyr-Tydvil, 1 B. & Ad. 29; Augustein *v.* Challis, 1 Exch. 279.

[5] Doe *v.* Harvey, 8 Bing. 289. But *contra*, see Augustein *v.* Challis, *ante*.

[6] Alderson *v.* Clay, 1 Starkie, 405.

[7] State *v.* McNally, 34 Me. 210; Rhoades *v.* Selin, 4 Wash. (U. S.) 715; Bank of U. S. *v.* Benning, 4 Cr. (U. S. C. C.) 81; Shults *v.* Moore, 1 McLean (U. S. C. C.), 520.

[8] Jacobs *v.* United States, 1 Brock. (U. S. C. C.) 520.

[9] Chicago, &c., R.R. Co. *v.* George, 19 Ill. 510.

the custom house, and her clearance is in writing, parol evidence is admissible to show her destination.[1]

Sec. 3. Rules as to Immovables, &c.

Inscriptions on monuments, tombstones, walls, surveyors' marks upon trees, or notices affixed to boards, and other *immovables* may be proved by parol.[2] This is upon the ground that the production of primary evidence is physically impossible, and as public convenience requires that such evidence should be received, and stands upon the same ground that copies of entries in the books of the Bank of England are admitted. The books of that bank being of great public concern to all of the national creditors, and as the removal of them would be so inconvenient, it was held by LORD MANSFIELD[3] that copies of entries therein might be received, and that principle has been adopted in England in a variety of cases since without question.[4] But copies of the journals of the House of Commons were rejected by LORD MANSFIELD[5] upon the ground that no such inconvenience would attend their removal, and

[1] Hadden *v.* People, 25 N. Y. 373

[2] Bartholomew *v.* Stephens, 8 C. & P. 728; Rex *v.* Fursey, 6 id. 84; Coyle *v.* Cole, 6 C. & P. 357; Tracy Peerage Case, 10 Cl. & F. 164; Sayer *v.* Glossop, 2 Exch. 409 *n*; Mortimer *v.* M'Callan, 6 M. & W. 68; Senney *v.* Wade, 7 Sim. 595. It must be remembered, however, that in the case of notices so affixed to walls, etc., *it must appear that the document was affixed to the freehold and could not easily be removed*, and if it is shown to have merely been fixed to the wall of a building by a nail or other contrivance to hold it in place, notice to produce it must be given before secondary evidence of its contents can be received. Jones *v.* Tarleton, 9 M. & W. 675. The same rule applies to documents deposited in a foreign country when the laws or established usages of such country will not permit its removal, because in such cases, as in the case of mural inscriptions, etc., their production by the party is physically impossible Alivon *v.* Furnival, 1 C., M. & R. 277. In the case of mural inscriptions, their value as evidence depends almost entirely upon the authority under which they were made, and the distance of time between their erection and the event they commemorate. Atheney Peerage, Pr. Min. 45. And the ease with which such evidence can be manufactured renders the strictest scrutiny necessary to prevent imposition.

[3] Rex *v.* Gordon, Doug. 593 *n*; Lynch *v.* Clerk, 3 Salk. 154; Marsh *v.* Calnett, 2 Esp. 665. The same rule prevails as to the books of custom houses. Rex *v.* King, 27 R. 234; Fuller *v.* Fitch, Carth. 346.

[4] LORD ABINGER, C. B., in Mortimer *v.* M'Callan, 6 M. & W. 67.

[5] In Rex *v.* Gordon, *ante*.

the same has been held in later cases.[1] The rule may be said to be that *where books, some of the contents of which it is desirable to prove, are of great public concern, and their removal would be productive of great public inconvenience,* copies of them may be received in evidence. This has been held in reference to the books of the Customs and Excise.[2] "It was formerly," says LORD ABINGER, C. B.,[3] "the practice to produce them, but after some consideration it was thought that the public inconvenience was so great, that it has become every day's practice, in this and other courts, to allow copies of those books to be received in evidence. *That goes upon the general principle of not removing books of general concernment.* Then does not that principle apply in all such cases? I think a case has been aptly put by my BROTHER ALDERSON, that if a writing were on a wall, might you not give evidence of the character of the handwriting, as probable evidence of who wrote it, without producing the wall in court? Suppose a man, instead of printing a libel in the usual way, were to write it on the dead walls of the metropolis, is it to be said that he cannot be punished because you cannot produce the wall in court? May you not, in such a case, prove his handwriting? Nor is this case altogether imaginary—I would mention a case which occurred very early in my professional life, where a man was convicted of writing a libel on the wall of the Liverpool jail. In that case the handwriting of the party was proved, and he was convicted. Formerly the actual production of an answer in Chancery was required, but the Lord Chancellor's officers had been in the habit of carrying out these documents without the consent of the Lord Chancellor, and as that was found to be inconvenient, they were forbidden to do it, and the consequence is, that an office copy is now given in evidence, in cases where the original would be evidence. I also remember a case where two persons were convicted in Ireland of a misdemeanor against the revenue laws, and who could only be identified by proving

[1] See 29 St. Trials, 685, where *printed* copies of such journals were rejected.

[2] Rex *v.* King, 2 T. R. 234; Fuller *v.* Fitch, Carth. 346.

[3] In Mortimer *v.* M'Callan, 6 M. & W. 68.

the entries they had made in the custom house books, which were not removable upon the general principle of inconvenience to the public; and some one was called, not to prove that he saw them there, but to prove their handwriting; a bill of exceptions was tendered upon that very point, and the House of Lords determined that it was admissible evidence. That is exactly this case, except that it is stronger. Therefore I think it is competent evidence, for the purpose of proving the identity of the party who accepts stock, to show that an entry in the books of the Bank of England was the handwriting of that party. The principle of law is, that where you cannot get the best possible evidence, you must take the next best; and where the law has laid down that you cannot remove the document in which the writing is made, you are to be entitled to the next best evidence of it, by proving whose writing it was."

Sec. 4. Application of the Rule.

The rule that secondary evidence is not admissible to take the place of a writing applies to warrants,[1] executions,[2] returns on executions,[3] bills of sale,[4] subscriptions to stock, etc.,[5] letters of administration,[6] maps,[7] records,[8] mortgages,[9] deeds of gift,[10] letters,[11] telegrams,[12] receipts,[13] deeds,[14] and in-

[1] State *v.* Atherton, 16 N. H. 203; United States *v.* Wary, 1 Cr. (U. S. C. C.) 312; Hackett *v.* Wing, 6 Allen (Mass.), 58.

[2] Swetser *v.* Drove, 19 Ala. 255.

[3] Rand *v.* Hadlock, 6 N. H. 514; McDade *v.* Mead, 18 Ala. 214.

[4] Yarbrough *v.* Hudson, 19 Ala. 653.

[5] Cincinnati R. R. Co. *v.* Cochran, 17 Ind. 516.

[6] Smith *v.* Wilson, 17 Md. 460.

[7] Pool *v.* Myers, 21 Miss. 466.

[8] Thelluson *v.* Shedden, 2 N. R. 228; Bogart *v.* Green, 8 Mo. 115; Graham *v.* O'Fallow, 3 id. 507. But, where a record, although required by law, has not been made, the facts which should so offer may be proved by parol. Gillett *v.* Commissioners of Lyon, 18 Kan. 410.

[9] Ord *v.* McKee, 5 Cal. 515.

[10] Andrews *v.* Hooper, 13 Mass. 472; Rains *v.* Prettyman, 29 Ga. 529.

[11] Farrell *v.* Brennan, 32 Mo. 328; Kidd *v.* Crammell, 17 Ala. 648; Guerrin *v.* Hunt, 6 Minn. 375; Halcombe *v.* State, 28 Ga. 66.

[12] Williams *v.* Brickell, 37 Miss. 682; Matteson *v.* Mayes, 25 Ill. 591. But see Cairo, &c., R. R. Co. *v.* Mahoney, 82 Ill. 78, in which it was held in an action by a surgeon against a railroad company for treating an employee, the fact of the injury being proved, that it might be shown that the station agent notified the superintendent of the *fact* by telegram.

[13] Hamlin *v.* Atkinson, 6 Rand. (Va.) 574; Ashe *v.* De Rasset, 8 Jones (N. C.) L. 240.

[14] Hanson *v.* Armstrong, 22 Ill. 442. Before secondary evidence of

deed any and all writings, the contents of which are material to the issue. Where deeds, contracts, etc., are executed in duplicate by all the parties, each part is treated as an original,[1] but where each part is executed by one party only, each counterpart is alternately the best evidence as against the party sealing it, and those in privity with him,[2] and secondary evidence may be given as to the contents of the other part.[3] While, where the law requires that a certain writing shall be recorded, the record is the best evidence of the facts recited therein, yet, until it is recorded, the writing itself is admissible,[4] and this is also the case where the statute does not require that a writing shall be recorded, or where it is refused because of informalities. Thus the statute made no provision that the action of a school district upon the question of borrowing money should be recorded or that the record should be the only primary evidence on the question or its results, and it was held that there might be oral primary evidence thereon.[5] But where the statute requires that certain instruments or matters shall be recorded and provides that such records shall be evidence of the facts contained therein, parol evidence is not admissible to prove the facts stated in the record.[6]

Sec. 5. Admissions of a Party dispense with the Rule, when.

In England, a tacit exception to the rule that oral testimony cannot be substituted for any writing, is made in favor of the parol admissions of a party to the record and of his acts amounting to admissions, and such admissions are re-

the contents of a deed can be given, three facts must appear: 1st, the existence and genuineness of the original; 2d, its loss; and 3d, evidence that the paper offered is an examined or sworn copy. Oliver *v.* Parsons, 30 Ga. 391. But, as a deed is not a written evidence of the contract between the vendor and vendee, but rather a performance of the vendor's obligation under the contract, it may be shown by parol what the contract in fact was. Trayer *v.* Reeder, 45 Iowa, 272; Mason *v.* Buchanan, 62 Ala. 110.

[1] Calling *v.* Tremeck, 6 B. & C. 398; Brown *v.* Woodman, 6 C. & P. 206.

[2] Hall *v.* Ball, 3 M. & G. 42; Doe *v.* Ross, 7 M. & W. 102.

[3] Munn & Godbald, 3 Bing. 292.

[4] Randall *v.* Preston, 52 Vt. 198.

[5] Board of Education *v.* Loft, 7 Ill. App. 571.

[6] Beaudeau *v.* Cape Girardeau, 71 Mo. 392.

ceived as primary evidence, although they relate to the contents of a deed or other instrument which are directly in issue,[1] and this is also the rule in Massachusetts.[2] But in New York it has been held, that the admissions of a party to the record can only be resorted to as evidence, where direct parol testimony of the facts thus sought to be proved, would be admissible, and consequently that they cannot be received for the purpose of proving matters of record, nor the contents of a written instrument, except in those cases where a ground has been laid for the reception of secondary evidence.[3] And although, in that State, the execution of a mere attested contract in writing may be proved in the first instance by such admissions,[4] yet such is not the case with regard to the execution of an instrument under seal, unless where a legal excuse has been given for the failure to produce the subscribing witness.[5] But on this point the law is the same in England, since, while it appears from the case cited[6] that admissions by a party to the record are there regarded as primary, and not as secondary evidence of the contents of a written instrument, it has, notwithstanding, been held that an acknowledgment under oath, by an answer in Chancery, will not suffice to prove the execution, without accounting for the absence of a witness by whom it has been attested.[7] It is, however, obvious that further proof may be waived, by an admission made for that purpose in court; and it has been held in Kentucky[8] that a party to an instrument might, in all cases, prove its execution by himself.

Sec. 6. Copies not admissible, unless.

Copies of writings, however accurate, in the absence of a statute making them primary evidence, are merely second-

[1] Slatteree *v.* Pooley, 6 M. & W. 664; Newhall *v.* Holt, 6 id. 662.

[2] Loomis *v.* Woodham, 8 Gray (Mass.), 557; Smith *v.* Palmer, 6 Cush. (Mass.) 513.

[3] The Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480; Jenner *v.* Joliffe, 6 John. (N. Y.) 5; Hasbrouck *v.* Baker, 10 id. 248. See also Jamison *v.* Conway, 10 Ill. 227; Mason *v.* Park, 4 id. 522; Threadgill *v.* White, 11 Ired. (N. C.) 591.

[4] Hall *v.* Phelps, 2 John. (N. Y.) 451.

[5] Fox *v.* Kiel, 3 John. (N. Y.) 477; Henry *v.* Bishop, 2 Wend. (N. Y.) 575; Hollenbeck *v.* Fleming, 6 Hill (N. Y.) 306.

[6] Slatteree *v.* Pooley, *ante.*

[7] Call *v.* Dunning, 4 East, 53.

[8] Smith *v.* Maro, 7 J. J. Mar. 445.

ary evidence, and are not admissible unless a proper ground for their admission as such has been laid,[1] and this rule applies when it becomes important to prove the contents of a manuscript which has been printed. The printed copy is not admissible unless a proper foundation for its admission has been laid;[2] also to letter-press copies and to copies taken by a copying machine.[3] But when the foundation has been laid for the admission of a printed copy, all printed copies struck off in one common impression are admissible.[4] It may sometimes be a question of some importance, and also of some nicety, to determine what instrument constitutes the primary evidence of a transaction. Especially is this question important in the case of bought and sold notes, and of telegrams — in the former case, as to whether the bought and sold rates or the broker's books are the proper evidence of the contract, and in the latter, whether the original message left at the transmitting office, or the message as received by the party to whom it was sent, is the original; and these questions will be considered under their proper heads.

Sec. 7. Secondary Evidence, what is; admissible when.

Secondary evidence is admitted in all cases where the principle which excludes it, to aid the supposed existence of better evidence behind, which it is within the power of the party to produce, does not apply; and the party desiring to

[1] Munson *v.* Blain, 15 Ind. 242; Lungsford *v.* Smith, 12 Gratt. (Va.) 554; Morrill *v.* Foster, 32 N. H. 358; Creed *v.* White, 11 Humph. (Tenn.) 549; Benton *v.* Craig, 2 Mo. 198; Chambers *v.* Hunt, 22 N. Y. L. 552; Marshall *v.* Harvey, 9 Gill (Md.), 251; Perkins *v.* Ermel, 2 Kan. 325; Redman *v.* Green, 3 Med. (N. C.) Ed. 54; Boynton *v.* Rees, 8 Pick. (Mass.) 329; Bowman *v.* Smith, 1 Strobh. (S. C.) 246; Carr *v.* Carr, 20 Mo. 408; Patton *v.* Rambo, 20 Ala. 485. See *post*, § , *Copies.*

[2] Rex *v.* Watson, 32 How. St. Tr. 82.

[3] Smith *v.* Moorehead Mfg. Co., 23 Minn. 141; Nodin *v.* Murray, 3 Camp. 228. Press copies of letters are admissible *against* a party if they purport to have been written by him, and are found in his possession, and appear to be in his handwriting, and the originals cannot be procured. Com. *v.* Jeffries, 7 Allen (Mass.), 548; see also Com. *v.* Eastman, 1 Cush. (Mass.) 189, where such evidence was admitted without objection.

[4] Rex *v.* Watson, *ante.*

make use of it, may prove that better evidence cannot be obtained by him.[1]

By the civil law, when documents or private writings had been lost by *inevitable accident*, any person having occasion to use them as evidence, was permitted to do so. The mere fact of loss, however, was not enough, it was also necessary to be shown that the loss was the result of an inevitable accident. "For instance," says Pothier, 781, "if in the case of a fire, or the pillage of my house, I had lost my papers, among which were the notes of my debtors, to whom I had lent money, or the acquittances for sums which I had paid to my creditors; whatever the amount of such notes or acquittances might be, I ought to be allowed to give parol evidence of the sums which I had lent or paid, *because it is by an unforeseen accident*, and without my fault that I have lost the notes or acquittances, which would have furnished me with written evidence." By *our* law, however, parol proof of the contents of written instruments may be given upon proof of their loss, from whatever cause, whether inevitable accident or sheer carelessness, or the voluntary acts of the party, provided proof is first made that diligent, but unavailing, search has been made for them in the place where they would be most likely to be found, and the evidence of loss and search is such as to make it apparent that parol evidence is the best evidence in the party's possession, or in his power to produce.[2] The contents of a paper *voluntarily* destroyed by a party may, after proof of its de-

[1] Rainy *v.* Bravo, L. R. 4 C. P. 287.

[2] Greeley *v.* Quimby, 22 N. H. 335; Williams *v.* Jones, 12 Ind. 561; Newsom *v.* Jackson, 26 Ga. 241; Morton *v.* White, 16 Me. 53; Conway *v.* State Bank, 13 Ark. 48; Mariner *v.* Saunders, 10 Ill. 113; Reddington *v.* Gilman, 1 Bosw. (N. Y.) 235; Holmes *v.* Marden, 12 Pick. (Mass.) 169; Sanders *v.* Sanders, 24 Ind. 133; Perkins *v.* Ermel, 2 Kan. 325; Chambers *v.* Hunt, 22 N. J. 552; Hussey *v.* Roquemore, 27 Ala. 281; Creed *v.* White, 11 Humph. (Tenn.) 549; Nicholson *v.* Hilliard, 2 Murph. (N. C.) 270; Waller *v.* School Dist., 22 Conn. 326; Steamboat *v.* Young, 3 Iowa, 268; State *v.* Gemmell, 1 Houst. (Del.) 9; Smith *v.* Steele, 1 H. & M. (Md.) 419; Flynn *v.* McGonnigle, 9 W. & S. (Penn.) 79; Tucker *v.* Bradley, 33 Vt. 324; Pool *v.* Myers, 21 Miss. 466; Bogart *v.* Green, 8 Mo. 115; Ord *v.* McKee, 5 Cal. 515; Diener *v.* Diener, 5 Wis. 483.

struction, be shown by parol ;[1] *but he must repel every inference of a fraudulent design in its destruction*, or such evidence will be rejected.[2] When the loss of the original is established, its contents may be proved by the next best evidence attainable, and, if no better evidence exists, by parol.[3] So too when a written instrument that becomes material to be used in evidence is beyond the jurisdiction of the court, verbal evidence of its contents may be given.[4]

If the paper writing is one which the party himself should have in his possession, before he can be permitted to put in secondary evidence of its contents, he must prove either its loss or destruction, or its non-production must be satisfactorily accounted for.[5] With respect to paper writings, proof of their contents may be made by secondary evidence : 1st, *Where the original writing is beyond the jurisdiction of the court, or is lost or destroyed* ;[6] 2d, *Where its production is physically impossible, or highly inconvenient*;[7] 3d, *Where it is in the hands of the opposite party, who, upon proper notice, refuses or neglects to produce it* ;[8] 4th, *Where it is in the*

[1] People *v.* Dennis, 4 Mich. 609; Riggs *v.* Taylor, 9 Wheat. (U. S.) 483; Orne *v.* Cook, 31 Ill. 238; Adams *v.* Guice, 30 Miss. 397; Downey *v.* Logan, 12 B. Mon. (Ky.) 386.

[2] Joannes *v.* Bennett, 5 Allen (Mass.), 169; Blake *v.* Fash, 44 Ill. 302.

[3] Granger *v.* Warrington, 8 Ill. 299; Cotton *v.* Campbell, 3 Tex. 493; Greeley *v.* Quimby, *ante;* Newsom *v.* Jackson, *ante.*

[4] Forrest *v.* Forrest, 6 Duer (N. Y.), 102; Ralph *v.* Brown, 3 W. & S. (Penn.) 395; Shorter *v.* Shepard, 33 Ala. 648; Blanchard *v.* Young, 11 Cush. (Mass.) 341; Denten *v.* Hill. 4 Hayw. (Tenn.) 84.

[5] Wilson *v.* Young, 2 Cr. (U. S. C. C.) 33; Felton *v.* McDonald, 4 D. & B. (N. C.) L. 406; Conway *v.* State Bank, 4 Ark. 48.

[6] Rex *v.* Johnson, 7 East, 66; Pendney *v.* Crescent Life Ins. Co., 21 La. An. 410; Halderman *v.* Halderman, 1 Hemp. (Tenn.) 559.

[7] Tracy's Peerage Case, 10 Cl. & F. 164; Mortimer *v.* McCallum, 6 M. & W. 68.

[8] United States *v.* Winchester, 2 McLean (U. S. C. C.) 135; Potier *v.* Barclay, 15 Ala. 439; Guines *v.* Fall, 15 Cal. 63; Bank of South Carolina *v.* Brown, Dudley (Ga.), 62; Jefferson *v.* Conaway, 5 Harr. (Del.) 16; State *v.* Lockwood, 5 Blackf. (Ind.) 145; Anderson Bridge Co. *v.* Applegate, 13 Ind. 339; Patterson *v.* Linden, 14 Iowa 414; Dupey *v.* Ashby, 2 A. K. Mar. (Ky.) 11; Williams *v.* Benton, 12 La. An. 91; Kennedy *v.* Fowke, 5 H. & J. (Md.) 63; Robertson *v.* Parks, 3 Md. Ch. 65; Commonwealth *v.* Emery, 2 Gray (Mass.), 80; Browne *v.* Boston, id. 494; Lewire *v.* Dille, 17 Mo. 64; Farmers and Mechanics' Bank *v.* Lunergon, 21 Mo. 46; Ford *v.* Munson, 4 N. J. L. 93; Rogers *v.* Van Hoeson, 12 Johns. (N. Y.) 220; Weeks *v.* Lyon, 18 Barb. (N. Y.) 530; Milliken *v.* Barr, 7 Penn. St. 23; Carland *v.* Cunning-

possession of a third person, who is not compellable by law to produce it and he, being called as a witness with subpœna duces tecum, relies upon his right to withhold it;[1] 5th, *Where there is a strong presumption of law in favor of the existence of the fact which the writing could be used to sustain;*[2] 6th, *Where the papers are voluminous, and it is only necessary to prove their general results;*[3] and, 7th, *Where the question arises on the examination of a witness on the voir dire.*[4]

Sec. 8. Loss of Paper, how established.

In order to bring a case within the first rule stated *supra*, the burden is upon the party seeking to make use of secondary evidence to establish either that the paper is beyond the jurisdiction of the court,[5] or that it is lost or destroyed.[6] Not only must the party prove that such a paper once ex-

ham, 37 id. 228; Kimble *v.* Joslin, 1 Overt. (Tenn.) 380; Farnsworth *v.* Sharp, 5 Sneed (Tenn.), 615; Dean *v.* Berder, 15 Tex. 298.

[1] Mills *v.* Oddy, 6 C. & P. 728; Marston *v.* Downes, 1 Ad. & El. 31; Doe *v.* Ross, 7 M. & W. 102.

[2] This rule applies in those cases where it is desirable to prove the appointment of public officers. The law raises a strong presumption from the undisturbed exercise of a public office, that the appointment is valid, and, therefore, it is not generally necessary to produce the written appointment of public officers, *but it is sufficient to show that they acted as such.* Allen *v.* McNeel, 1 Mill (S. C.) Const. 459; Brewster *v.* Sewell, 3 Br. Ala. 302; Bunbury *v.* Matthews, 1 C.&K.382; Rex *v.* Verlst, 4 Camp. 432; Berryman *v.* Wise, 4 T. R. 366; Rex *v.* Howard, 1 M. & Rob. 187. See *post*, § , *Presumptions.*

[3] Roberts *v.* Doxon, Peake, 83; Meyer *v.* Lefton, 2 Starkie, 274.

[4] Butchers' Co. *v.* Jones, 1 Esp. 160; Miller *v.* Mariners' Church, 7 Me. 51; Rex *v.* Gesburn, 15 East, 57; Sewell *v.* Stubbs, 1 C. & P. 74; Botham *v.* Swingler, 1 Esp. 164; Carlisle *v.* Eady, 1 C. & P. 234.

[5] Sunday *v.* Thomas, 26 Ga. 537; Shorter *v.* Sheppard, 33 Ala. 648; Ralph *v.* Brown, 3 W. & S. (Penn.) 395; Burnham *v.* Wood, 8 N. H. 334; Waller *v.* Cralle, 8 B. Mon. (Ky.) 11; Forrest *v.* Forrest, 6 Duer (N. Y.), 102; Schaeffer *v.* Georgia R. R. Co., 66 Ga. 39; Brown *v.* Wood, 19 Mo. 475; Underwood *v.* Lane, 1 Dev. (N. C.) D. 173. In Topping *v.* Bickford, 4 Allen (Mass.), 120, it was held that where the books of a foreign corporation are in another State, a party is not bound to produce them, and that depositions of its late officers were admissible, although, in reply to cross-interrogatories requesting them to do so, they did not annex the records of the company, or copies of them, if they were not in their custody. In a later case—Binney *v.* Russell, 109 Mass. 55, where a witness whose deposition was taken out of the State refused to annex an original document in his possession to his deposition, but did annex a copy of it which he swore to be correct, it was held that the copy was admissible. See also Amherst Bank *v.* Conkey, 4 Met. (Mass.) 459.

[6] Emery *v.* Vinall, 26 Me. 295;

isted,[1] but also its due execution,[2] genuineness,[3] and its loss or destruction,[4] without culpability on his part,[5] but he must also

Patton *v.* Rambo, 20 Ala. 485; Sims *v.* Sims, 5 Humph. (Tenn.) 370; Morrison *v.* Welty, 18 Md. 169; Manson *v.* Blair, 15 Ind. 242; Ohio Ins. Co. *v.* Nunemacher, 10 id. 234; Perkins *v.* Ermel, 2 Kan. 325; Hughes *v.* Easten, 4 J. J. Mar. (Ky.) 572; Marshall *v.* Harvy, 9 Gill (Md.), 251; Dunnock *v.* Dunnock, 3 Md. Ch. 140; Boynton *v.* Rees, 8 Pick. (Mass.) 329; Benton *v.* Craig, 2 Mo. 198; Morrill *v.* Foster, 32 N. H. 358; Bozorth *v.* Davidson, 3 N. J. L. (2 Penn.) 617; Chambers *v.* Hunt, 22 N. J. L. 552; Redman *v.* Green, 3 Ired. (N. C.) Eq. 54; Bowman *v.* Smith, 1 Strobh. (S. C.) 246; Moury *v.* Schroder, 4 id. 69; Creed *v.* White, 11 Humph. (Tenn.) 549; Langsford *v.* Smith, 12 Gratt. (Va.) 554; Ransdale *v.* Grove, 4 McLean (U. S. C. C.), 282; Lewis *v.* Baird, 3 id. 56; Reynolds *v.* Quattlebaume, 2 Rich. (S. C.) 140; Hussey *v.* Roquemore, 27 Ala. 281; Thalick *v.* Presley, 29 id. 427; Griffith *v.* Huston, 7 J. J. Mar. (Ky.) 385; Spence *v.* Spence, 2 Brev. (S. C.) 466; Gillespie *v.* Tucker, id. 433; United States *v.* Porter, 3 Day (Conn.), 283; Norris *v.* Russell, 5 Cal. 249; Morgan *v.* Jones, 24 Ga. 155; Sloo *v.* Roberts, 7 Ind. 128.

[1] Thompson *v.* Thompson, 9 Ind. 323; Lamerson *v.* Hoffman, 24 N. J. L. 674; Culpepper *v.* Wheeler, 2 McMull (S. C.), 66; Dean *v.* Pond, 1 N. J. L. 379; Hewes *v.* Wiswell, 8 Me. 94; Weatherhead *v.* Baskerville, 11 How. (U. S.) 329; Hanna *v.* Price, 23 Ala. 826; Swift *v.* Fitzhugh, 9 Port. (Ala.) 39; Downing *v.* Pickering, 15 N. H. 344; Stockdale *v.* Young, 3 Strobh. (S. C.) 501 *n*; Baskin *v.* Seechrist, 6 Penn. St. 154; Jackson *v.* Woodruff, 11 Johns. (N. Y.) 446.

[2] Jackson *v.* Woods, 29 Penn. St. 375; Atwell *v.* Lynch, 39 Mo. 519; Perry *v.* Roberts, 17 id. 36; Embury *v.* Millar, 1 A. K. Mar. (Ky.) 300; Kimball *v.* Morrell, 4 Me. 368; Goodier *v.* Lake, 1 Atk. 446; Doe *v.* Whitefoot, 8 C. & P. 270; Jackson *v.* Frier, 16 Johns. (N. Y.) 196; Rex *v.* Culpepper, Skin. 673. If the paper was an attested instrument, the attesting witness should be called, or, in the event of his death, or his whereabouts are unknown, his handwriting should be proved precisely in the same way as if the deed or instrument had been produced. But if it cannot be ascertained where the attesting witness was, this strictness of proof will not be required. Taylor on Ev. § 316.

[3] Reynolds *v.* Jourdan, 6 Cal. 108; Stowe *v.* Thomas, 12 Penn. St. 209; McPherson *v.* Rathbone, 7 Wend. (N. Y.) 216.

[4] Eakin *v.* Vance, 18 Miss. 149; Morrill *v.* Foster, 32 N. H. 358; Carr *v.* Carr, 36 Mo. 408; Thalick *v.* Pressly, 29 Ala. 427. Or the absence of the writing must be accounted for in a satisfactory manner. Wiswall *v.* Knevals, 18 Ala. 65; Baldwin *v.* Massie, 7 Wheat. 122; Bigelow *v.* Young, 30 Ga. 121; Durham *v.* Holeman, id. 619; Dermont *v.* McKracken, 6 Blackf. (Ind.) 356; Perkins *v.* Bard, 16 La. An. 443; Marks *v.* Winter, 19 id. 445; Young *v.* Mackall, 3 Md. Ch. 398; Doe *v.* McCaleb, 3 Miss. 756; Brighton, &c., Bank *v.* Philbrick, 40 N. H. 506; Sterling *v.* Potts, 5 N. J. L. 773; Cary *v.* Campbell, 10 John. (N. Y.) 363; Dumas *v.* Powell, 3 Dev. (N. C.) L. 103; Thompson *v.* Applewhite, 1 Dev. (N. C.) Eq. 460; Caufman *v.* Congregation, 6 Binn. (Penn.) 59; Dawson *v.* Graves, 4 Call (Va.), 127; Brackett *v.* Evans, 1 Cush. (Mass.) 79.

[5] Winona *v.* Hoff, 11 Minn. 119. Even where a paper is voluntarily

repel every inference of fraudulent intent in its destruction, or such evidence will be rejected.[1] He must prove its destruction positively, or presumptively by showing that it has been thrown aside as useless,[2] or that its destruction was the result of accident, or was without the agency or consent of the party who seeks to show its contents. The object of the rule which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes. Therefore, when it appears that the best evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. But if the destruction was made upon an erroneous impression of its effect, secondary evidence is admissible. The motive is the controlling fact.[3]

Thus, parol evidence was offered to prove that the plaintiff executed a discharge of the defendant from a certain claim, and tendered it to him in the court room, by putting it in his lap, and that he brushed it, or it fell, upon the floor, and

destroyed by a party, he may, after proof of its destruction, give secondary evidence of its contents. People *v.* Dennis, 4 Mich. 609; Downy *v.* Logan, 12 B. Mon. (Ky.) 386; Riggs *v.* Taylor, 9 Wheat. (U. S.) 483; Adams *v.* Guice, 30 Miss 397; Orne *v.* Cook, 31 Ill. 233.

[1] Joannes *v.* Bennett, 5 Allen (Mass.), 169; Blake *v.* Frost, 44 Ill. 102. It is for the court to determine whether the paper was destroyed with a fraudulent intent. Smith *v.* Holyoke, 112 Mass. 517; Randolph *v.* Lane, 57 Ind. 115; Renna *v.* Bank of Columbia, 9 Wheat. (U. S.) 581.

[2] Rex *v.* Johnston, 7 East, 69. In this case the publisher of a paper, in which a libel had appeared, stated that he believed the original was either destroyed or lost, having been thrown aside as useless. It was held sufficient to let in proof of loss. See also Kensington *v.* Ingles, 8 East, 278; see also Smith *v.* Holyoke, 112 Mass. 517. Where in an action the contents of certain letters written to her as the defendant became important as proof, and the plaintiff having sworn that she having no further use for them had destroyed them, the court held that the reason given justified the judge in holding that they were not destroyed with a fraudulent intent.

[3] Bagley *v.* McMickle, 9 Cal. 430; see also Rex *v.* Johnston, *ante*.

was not afterwards seen. It was held that such evidence was admissible, the instrument, under such circumstances, being considered a lost paper.[1]

Where the loss or destruction of the paper is probable, very slight evidence of its loss or destruction will be required, *and a useless paper* will be presumed to have been destroyed.[2]

Sec. 9. Search, Sufficiency of.

Where the paper writing sought to be established by secondary evidence should be in the custody of the party seeking to show its contents, or in the custody of some person not a party to the suit, within the jurisdiction of the court, such evidence is not admissible unless the party satisfies the court that he has used due diligence, and has been unable to find it.[3] He must establish its loss by proof that he has made diligent but unavailing search for the paper in places where it would be most likely to be found, and the *degree* of diligence necessary to be shown must necessarily depend upon the value and importance of the lost document and the circumstances of each case.[4]

Stoddard *v.* Mix, 14 Conn. 12.

[2] Rex *v.* E. Farleigh, 6 D. & R. 153; Freeman *v.* Arkell, 2 B. & C. 496. The admission of the defendant that he destroyed the paper, is sufficient. Rhode *v.* McLean, 101 Ill. 467.

[3] Davis *v.* Spooner, 3 Pick. (Mass.) 284; Poignand *v.* Smith, 8 id. 272. The burden of showing the loss of a written instrument is upon the party seeking to introduce secondary evidence, and no instrument can be said to be lost until a careful search has been made for it. Hausen *v.* American Ins. Co., 57 Iowa, 741. In the case of judgment rolls and other documents required to be kept in the custody of certain officers, if they cannot be found in the proper place, the presumption is that they are lost or destroyed. Mandeville *v.* Reynolds, 68 N. Y. 528.

[4] Spalding *v.* Bank of Susquehanna Co., 9 Penn. St. 28; Witter *v.* Latham, 12 Conn. 399; Gully *v.* Bishop of Exeter, 4 Bing. 298. In Pardoe *v.* Price, 13 M. & W. 267, where an assignment of turnpike tolls had been executed by way of mortgage to K, it was held, in an action by K's personal representative, after his death, against the trustees for arrears of interest, that a search for the security in the office of K's solicitor, where his papers had been deposited, except some deposited in a suit against K's representative, in the office of one of the Masters in Chancery, and also in the latter office, without finding the security among any of such papers, was sufficient evidence of

The object of the proof is merely to establish a presumption of the loss of the paper, therefore the party is not generally required to show that he has made such a search as would be made for stolen goods, nor be in a position to negative every possibility of its having been kept back, but it is sufficient if he has, in good faith, exhausted, in a reason-

its loss to let in secondary evidence; and that entries in a book of the trustees, endorsed "Mortgage Book," containing an abstract of the names of the creditors, the amounts of their securities, and the interest due upon them, was good secondary evidence of such security. Where the party who had the custody of the paper swears that he has searched "everywhere where it could be expected to be found" Pierce *v.* Wallace, 18 Cal. 165, or that "it is not in his possession or control" Prettyman *v.* Wallace, 34 Ill. 175, or "it is lost, I cannot tell what has become of it" Voorhees *v.* Dorr, 51 Barb. (N. Y.) 580, has been held sufficient. Drake *v.* Rainey, 3 Rich. (S. C.) 37; Poe *v.* Darrah, 20 Ala. 288; Braintree *v.* Battles, 6 Vt. 395; Graff *v.* Pittsburgh R. R. Co., 31 Penn. St. 487. Proof by the grantee in a deed that he deposited it in the post-office directed to another, who testifies that he never received it, and that inquiry has been made at the office of deposit and delivery, and to the general post-office, by letter, without finding the deed, has been held sufficient. M'Rae *v.* Pegues, 4 Ala. 158. So where the plaintiff testified that he deposited a postal card in the post-office, and the defendant never received it, it was held to constitute a sufficient ground for letting in secondary evidence of its contents without any search for it. Vancil *v.* Hagler, 27 Kan. 407. What will constitute due diligence in the search for public records and documents, so as to admit secondary evidence in proof of their contents, will depend upon the circumstances of each particular case. Thus where more than 20 years have elapsed since the sale, and the register of probate testifies that he had made search of the records in the case of N. S.; that he found but part of the papers in that case; that he found the files in very bad condition, and some of them broken open and loose; and that he examined the index of the records for the year or two spoken of, without finding the papers desired or reference to the record thereof in the index, the court will admit parol evidence to show the contents of such papers, especially when the transaction occurred many years before. Simpson *v.* Norton, 45 Me. 281. In Brewster *v.* Sewell, 3 B. & Ald. 303, Abbott, C. J., said: "When the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient;" and Best, J., said: "If a paper be of considerable value, or if there be reason to suspect that the party not producing it has a strong interest which would induce him to withhold it, a very strict examination would probably be required; but if a paper be utterly useless, and the party could not have any interest in keeping it back, a much less strict search would be necessary to let in parol evidence."

able degree, all the sources of information and means of discovery which the nature of the case would naturally suggest,[1]

If the instrument was an indenture, interchangeably signed and sealed, or if it was executed in duplicate, and the part belonging to the party seeking to use it, is lost, due diligence must be shown to ascertain whether any counterpart exists, and if so, to obtain it to be used upon the trial.[2] All the proper sources from which primary evidence can be secured must be first exhausted,[3] and if there are several places of

[1] Folsom *v.* Scott, 6 Cal. 460; M'Gahey *v.* Alston, 2 M. & W. 214; Hatch *v.* Carpenter, 9 Gray (Mass.), 271; Atherton *v.* Phœnix Ins. Co., 109 Mass. 32; Tillotson *v.* Warner, 3 Gray (Mass.), 574. It may be stated as a general rule that a party is not allowed to produce secondary evidence *until a bona fide and diligent search has been unsuccessfully made for the lost instrument, in the place where it was most likely to be found.* Meek *v.* Spencer, 8 Ind. 118; S. P. Cook *v.* Hunt, 24 Ill. 535; Holbrook *v.* School Trustees, 28 Ill. 187; Dickerson *v.* Talbot, 14 B. Mon. (Ky.) 60; Sellers *v.* Carpenter, 33 Me. 485; Kidder *v.* Blaisdall, 45 Me. 461; Murray *v.* Buchanan, 7 Blackf. (Ind.) 549; Mullikin *v.* Boyce, 1 Gill (Md.), 60; Glenn *v.* Rogers, 3 Md. 312; Doe *v.* McCaleb, 3 Miss. 756; Barton *v.* Munian, 27 Mo. 235; Jackson *v.* Hasbrouck, 12 Johns. (N. Y.) 192; Jackson *v.* Frier, 16 id. 192; Jackson *v.* Root, 18 id. 60; Poignand *v.* Smith, 8 Pick. (Mass.) 272; Dan *v.* Brown, 4 Cow. (N. Y.) 483; Jackson *v.* Betts, 6 id. 377; 9 id. 208; Dreisbach *v.* Birger, 6 Watts & S. (Penn.) 564; Parke *v.* Bird, 3 Pa. St. 360; Vaulx *v.* Merriwether, 2 Sneed (Tenn.), 683; Wade *v.* Work, 13 Tex. 482; Royalton *v.* Turnpike Co., 14 Vt. 311; Fletcher *v.* Jackson, 23 Vt. 581.

The following testimony of an attorney was held sufficient to warrant the introduction of secondary evidence of the contents of a letter sent to him by his client in the previous case: "I do not know where that letter is. I have searched twice during the past week for it among my papers at my office and other places where I keep my papers, but have not been able to find it. My impression is, that the letter lay upon my table till after I had seen the plaintiff at that trial, and then went into the waste basket." On cross-examination he testified: "I did not look through *all* my files of letters and papers, for when I came across a file marked as of a previous year, I did not search through it; I did not examine the papers I looked over, one by one, and there were places containing papers (but not private papers) that I did not examine." Hatch *v.* Carpenter, 9 Gray (Mass.), 271.

[2] Poignand *v.* Smith, 8 Pick. (Mass.) 272; Rex *v.* Castleton, 6 T. R. 206; Mann *v.* Godbald, 3 Bing. 292.

[3] Rex *v.* Stokes, 1 B. & Ald. 373; Hemphill *v.* McClimans, 24 Penn. St. 367; Graff *v.* Pittsburgh R. R. Co., 31 id. 489; Rush *v.* Whitney, 4 Mich. 495; Drake *v.* Rainey, 3 Rich. (S. C.) 37; Leland *v.* Cameron, 31 N. Y. 115. The deputy clerk of a court testified that he had diligently searched for a certain bill

deposit, all should be searched.[1] If the instrument ought to have been deposited in a public office, it will generally

and answer in their proper place, could not find them, and did not believe they were in the office, and showed a receipt for them given by S., a former attorney of the party against whom they were sought to be given in evidence. S. swore he had delivered them to G., his successor in the case now on trial, and had just searched for them in his own office and could not find them. G. swore he had never seen or had them. It was held that this was a sufficient foundation for the introduction of secondary evidence of their contents. Carr *v.* Miner, 42 Ill. 179. So the destruction of the dwelling house of a party by fire raises such a presumption of the loss of papers as to let in parol evidence of their contents. Harrison *v.* Long, 4 Desau. (S. C.) 110. But in such a case if any papers are saved, it must appear that they were also examined, for the paper in question might be one of those saved. Folsom *v.* Scott, 6 Cal. 460. Where proof was made to the court that the executor of the grantee had searched for an original deed and had not been able to find it; that after the grantee's death his son had carried off to a place in the country a trunk containing his father's papers, which the executor had not searched, but he had made verbal application to him for the trunk and the deed, it was held that a copy was not admissible because the paper might be in the trunk, which was not examined, and no step had been taken to bring the executor into court with a subpœna *duces tecum*. Tannis *v.* St. Cyre, 21 Ala. 449. So where a bond given to secure the claims of A. and divers others, was traced into the hands of A., and A. subsequently assigned all his claims and demands to B. and C., and search was made for the bond among the papers of B. only, it was held not to be such evidence of the loss of the bond and a diligent search for it as to justify the admission of secondary evidence of its contents. Kimball *v.* Bellows, 13 N. H. 58. So where a subpœna *duces tecum* was served three or four days before the trial, on a lessee, requiring him to produce his lease, and he was sworn as a witness, and stated that he had not had time to search all his papers to find the lease, but that he had made some search in the most probable places; that he might have destroyed it, but he did not recollect to have done so; that he had not seen it for a year, etc., it was held that the loss of the lease was not sufficiently proved to authorize the admission of parol evidence of its contents. McNeely *v.* Rucker, 6 Blackf. (Ind.) 391. In Hagnett *v.* Eilis, 17 Mich. 351, it was held erroneous to allow a party claiming land under an execution sale to give parol evidence of the affidavit and bond required to give the court jurisdiction, and other papers filed in the case, after merely showing by the justice who rendered the judgment that he delivered the docket, and, he believed, the files also, to his successor; that he had looked for the files and could not find them, and by his successor that he was very certain he had not received the files, but that he had not searched for them.

[1] Richards *v.* Lewis, 11 C. B. 1035; Rex *v.* Morton, 4 M. & S. 48. But where the paper was last seen in the possession of a person who lives in another State, and a diligent

be sufficient to search for it there.[1] But where it may be in either of two or more places, all the places should be

search has been made for it in the place where it ought to be if in the State, secondary evidence of its contents is admissible. Clifton *v.* Lilley, 12 Tex. 130.

[1] Rex *v.* Stourbridge, 8 B. & C. 96; M'Gahey *v.* Alston, 2 M. & W. 206; Farnley *v.* Worthington, 1 M. & G. 491. When diligent search has been made, unsuccessfully, for a paper, by a person in whose hands the law presumes it to be, it is in judgment of law a lost paper, and secondary evidence of its contents is admissible. Bell *v.* Young, 1 Grant (Penn.) Cas. 175.

If a defendant, when applied to for a deed, denies having it in his possession, and expresses his belief that it is in the register's office, where an ineffectual search is made for it, and also in the office of a lawyer, who once had it in his possession, a sufficient predicate is laid for proof of the deed by a certified copy, and no notice to the party, to produce the deed, is necessary. Shields *v.* Boyd, 15 Ala. 818. To authorize secondary evidence of the contents of an execution, issued by a justice of the peace, it is sufficient to show, by the justice, that he cannot, after diligent search, find it in his office, and has not seen it since the last term of the circuit court, when it went before the jury as evidence in another cause, accompanied by the testimony of the circuit clerk that he has made diligent but unsuccessful search for it among the files of his office containing the trial papers of the last term. Johnson *v.* Powell, 30 Ala. 113.

Where there is evidence that a written bill of sale has been in the possession of one or the other of *two* persons, oral testimony as to its contents is not admissible, without first proving that both of them have searched for it and been unable to find it. Patterson *v.* Keystone, &c., Co., 30 Cal. 360. And upon a question of diligence, in the search for written documents, so as to entitle the party to introduce secondary evidence, he must show that he has, in good faith, exhausted all the sources of information and means of discovering which the nature of the case would naturally suggest, and which was accessible to him. Ellis *v.* Smith, 10 Ga. 253. But if a party, with whom a contract was left for safe keeping, swears that he has made diligent search for it, and cannot find it among his papers, its contents may be proved by parol. Doyle *v.* Wiley, 15 Ill. 576. And very much less diligence in searching for a paper, before offering secondary evidence of its contents, will be required when the paper in question belongs to the adversary, than when it belongs to the party offering the testimony. Desnoyer *v.* McDonald, 4 Minn. 515.

In Vermont, the court will not presume that a deed of lands has been recorded, or require the party to search the records, before retorting to oral evidence of the contents of the deed. If the opposite party, in whose possession the deed is presumed to be, is out of the State, notice to his counsel to produce the original is sufficient to warrant the introduction of secondary evidence of its contents. Mattocks *v.* Stearns, 9 Vt. 326.

In Beall *v.* Dearing, 7 Ala. 124, it was held that an unsuccessful attempt to take the deposition of a non-resident, in whose possession a deed was last known to be, to es-

searched, and if it may be in the custody of either of two or more persons, inquiry should be made of all of them.[1] If the person entitled to the custody of the paper is dead, inquiries should be made of his personal representatives, and if it relates to his real estate, of his heirs also.[2] It is not necessary that the search should have been recent, if, at the time when it was made, it was thorough and diligent, and, in one case,[3] it was held sufficient, although made three years before, although the court said it would have been more satisfactory if the papers had been again examined; and in a Pennsylvania case[4] it was held that a search made *more* than one year before the trial is not sufficient.

Sec. 10. When Paper is in Possession of the Adverse Party. Rule.

When any written instrument is in the possession or under the control of the adverse party, secondary evidence cannot be given of its contents, unless a reasonable notice is served upon him, or his attorney, to produce it,[5] and the party neglects or refuses to do so.[6]

tablish its existence, contents, and loss, is equivalent to a demand of the deed, and that where it was of ancient date, and such as would not probably be preserved a great length of time, as a bill of sale of slaves, such an attempt, and inquiry of persons who were supposed to know of it, was sufficient proof of diligence to let in secondary evidence.

[1] Hall *v.* Bland, 3 M. & G. 247; Cruise *v.* Clancy, 6 Ir. Eq. 552; Ploxton *v.* Dare, 10 B. & C. 17, Taylor on Ev. (1st ed.) 307.

[2] Rex *v.* Pidlehinton, 3 B. & A. 460.

[3] Fitz *v.* Rabbits, 2 M. & R. 60.

[4] Porter *v.* Wilson, 13 Penn. St. 541.

[5] Webster *v.* Clark, 30 N. H. 245; Reading R. R. Co. *v.* Johnson, 7 W. & S. (Penn.) 317; Waring *v.* Warren, 1 John. (N. Y.) 340; Com. *v.* Parker, 2 Cush. (Mass.) 212; Dennis *v.* Barber, 6 S. & R. (Penn.) 420; Pond *v.* Lockwood, 8 Ala. 667; Dean *v.* Borden, 15 Tex. 298; Anderson Bridge Co. *v.* Applegate, 13 Ind. 339; Turnpike Co. *v.* Whiting, 10 Mass. 327; Myer *v.* Barker, 6 Binn. (Penn.) 228.

[6] Narragansett Bank *v.* Atlantic Silk Co., 3 Met. (Mass.) 282; Loring *v.* Whittemore, 13 Gray (Mass.), 228; Cooper *v.* Granberry, 33 Miss. 117; Fraux *v.* Fraux, 2 N. J. L. 166; Jackson *v.* Livingston, 7 Wend. (N. Y.) 136; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267; Faribault *v.* Ely, 2 Dev. (N. C.) L. 67; Sally *v.* Geinter, 13 Rich. (S. C.) 72; Maxwell *v.* Light, 1 Call (Va.), 117; Riggs *v.* Taylor, 9 Wheat. (U. S.) 83; Bright *v.* Young, 15 Ala. 112; Rowley *v.* Doe, 6 Blackf. (Ind.) 143; Smith *v.* Reed, 7 Ind. 242; Greenough *v.* Shelden, 9 Iowa, 503; McDowell *v.* Hall, 2 Bibb (Ky.), 610; Bank of Kentucky *v.* McWilliams, 2 J. J. Marsh. (Ky.) 256; McQueen

The notice to produce must be served a reasonable time before the trial, and the question as to what is a reasonable time will depend upon the circumstances of the case, the distance at which the party lives from the place of trial, or from the place where the paper is kept, and his power to produce it.[1] Thus, where the party's counting-house was near the court-house, notice to produce his books, given the evening before the trial, was held to be reasonable ;[2] and the same day, where the party lived near the court-house ;[3] and the day before, even where the paper was in the possession of a person eighty miles away ;[4] and several days before, where the party lived out of the State ;[5] and even on trial, if the paper is in court;[6] and generally the sufficiency of the notice, both as to matter and the time, rests in the discretion of the court in view of all the circumstances.[7] One notice given in the same suit is good, although the action is not tried for years afterwards,[8] and even upon a new trial of the action.[9] But a notice entitled in another cause to produce books in evidence, merely filed in the present cause, without proof of service, raises no inference against the party to whom the notice is addressed.[10]

The notice should be in writing,[11] but, unless the statute or rules of court otherwise provide, there is no reason why a verbal notice is not sufficient.[12] If the notice is in writing, it

v. Sandel, 15 La. Ann. 140 ; Lowell *v.* Flint, 20 Me. 401; Thayer *v.* Middlesex Mutual Insurance Co., 10 Pick. (Mass.) 326.

[1] Shreve *v.* Dulaney, 1 Cr. (U. S. C. C.) 499 ; Hammond *v.* Hopping, 13 Wend. (N. Y.) 505 ; Jefford *v.* Ringold, 6 Ala. 544.

[2] Shreve *v.* Dulaney, *ante.*

[3] Buckner *v.* Morris, 2 J. J. Mar. (Ky.) 121.

[4] Cady *v.* Hough, 20 Ill. 43.

[5] Jefford *v.* Ringold, 6 Ala. 644.

[6] Board, &c., *v.* Finnemore, 1 N. Y. L. 242; Atwell *v.* Miller, 6 Md. 10 ; Brown *v.* Oshell, 11 Ala. 199 ; McPherson *v.* Rathbone, 7 Wend. (N. Y.) 216; Anonymous, Anth. (N. Y.) 199. But a notice given during the trial is not sufficient, if the paper is not in court. Durkee *v.* Leland, 4 Vt. 612 ; Barker *v.* Barker, 14 Wis. 131 ; Burtin *v.* Kane, 17 id. 37.

[7] Cummings *v.* McKinney, 5 Ill. 57.

[8] Gilmore *v.* Wade, Anth. (N. Y.) 64 ; Jackson *v.* Shearman, 6 John. (N.Y.) 19 ; Patten *v.* Goldsborough, 9 S. & R. (Penn.) 47.

[9] Hope *v.* Beadon, 17 Q. B. 209.

[10] Allender *v.* Vestry of Trinity Church, 3 Gill (Md.), 166.

[11] Cummings *v.* McKinney, *ante.*

[12] Houseman *v.* Roberts, 5 C. & P. 394 ; Cates *v.* Winter, 3 T. R. 306 ; Hughes *v.* Budd, 8 Dowl. 315.

may be directed either to the party or his attorney,[1] and may be served on either, or may be left with the attorney's clerk at his office, or at the dwelling-house of the party, in the hands of his servant ;[2] and if it is served on both, a bad service upon one will not invalidate the notice to the other.[3] The notice is sufficient if it specifies the paper desired with sufficient certainty to indicate what paper is meant.[4] Thus, notice was given to an attorney of the defendant to produce on the trial a certain letter written by the plaintiff to the defendant, concerning an execution which was produced on a former trial in the same cause, "and all other papers in your custody or power relating to the matter in controversy in this cause." It was held that the notice was sufficiently explicit to apprise the attorney that the execution was one of the papers which he was called upon and expected to produce, especially when it was shown that on such former trial the letter and execution had been produced by the defendant's attorney himself, and he must have known that it was the principal paper wanted.[5] A notice to produce "all letters written by plaintiff to defendant relating to the matters in dispute in this action,"[6] or "all letters written to, and received by, plaintiff between 1837 and 1841, both inclusive, by and from the defendants, or either of them, and all papers, etc., relating to the subject-matter of this cause,"[7] has been held sufficient to let in secondary evidence of a particular letter not otherwise specified. So a notice to produce "all accounts, papers and writings in any way relating to the matters in question in this case" sufficiently particularizes a written account of the work done by the plaintiff, delivered to the defendant, and admitted by him to be correct.[8] And

[1] Brown *v.* Littlefield, 7 Wend. (N. Y.) 454; Divers *v.* Foulton, 8 G. & J. (Md.) 402; Logan *v.* Patterson, 1 Blackf. (Ind.) 327.

[2] Doe *v.* Martin, 1 M. & R. 242; Evans *v.* Swett, Ry. & M. 83.

[3] Hughes *v.* Budd, *ante*.

[4] Bogart *v.* Brown, 5 Pick. (Mass.) 18; Bemis *v.* Charles, 1 Met. (Mass.) 440; Walden *v.* Davison, 11 Wend. (N. Y.) 65.

[5] Walden *v.* Davison, 11 Wend. (N. Y.) 65.

[6] Jacob *v.* Lee, 2 M. & Rob. 33, PATTESON, J.

[7] Morris *v.* Hauser, id. 392, LORD DENMAN, C. J.

[8] Rogers *v.* Custance, 2 M. & Rob. 179.

in a more recent case a notice to produce "all letters relating to your tenancy of a room, etc.," was held sufficient to include a letter which, with the plaintiff's reply, constituted the tenancy.[1] The notice must not, however, be too general, as "all letters."[2] In an early English case[3] it was held by BEST, C. J., that a notice to produce "all letters, papers and documents touching or concerning the bill of exchange mentioned in the declaration, and the bill sought to be recovered," did not sufficiently describe a notice of dishonor sent by the plaintiff to the defendant. But this decision is not consistent with the more recent cases cited above. If the title of the cause is misdescribed in the notice, it has been held bad.[4] But in that case no title at all was necessary, and there were other grounds of decision; nor was there in that case any ground for supposing that the misdescription could mislead. In a later case, where the notice was entitled in a wrong court, it was considered sufficient.[5] Notice to produce a letter purporting to enclose an account is sufficient notice to produce the account.[6]

It is generally not desirable to enter into a minute description of the paper or papers covered by the notice, because if any material errors were to creep into the particulars the party might urge with possible success that he had been misled thereby. If enough is stated in the notice to induce the party to believe that a particular instrument will be called for, it is sufficient.[7]

The question whether there is sufficient evidence that the opposite party has the papers involved in the notice, where they are not such as should be in his possession, is for the court.[8]

Sec. 11. When Notice to Produce, is unnecessary.

There are several instances in which, although the writing is in the hands of the opposite party, no notice to produce

[1] Conybeare *v.* Farries, L. R., 5 Exch. 16.

[2] Gardner *v.* Wright, 15 L. T., N. S. 325; Jones *v.* Edwards, McCl. & Y. 139.

[3] France *v.* Lucy, Ry. & M. 341.

[4] Harvey *v.* Morgan, 2 Stark. 19.

[5] Lawrence *v.* Clark, 14 M. & W. 250.

[6] Engall *v.* Druce, 9 W. R. 536.

[7] Rogers *v.* Custance, *ante.*

[8] Hervey *v.* Mitchell, 2 M. &. R. 366.

it is necessary, as a preliminary to letting in secondary evidence of its contents.

These exceptions to the general rule are :

1*st*. *Where the instrument is in the hands of the adversary, and that tendered in proof is either a duplicate or counterpart, and the part offered was executed by him or by some person through whom he claims.*[1]

2*d*. *Where the instrument to be proved is itself a notice,*[2] as a notice to quit,[3] of the dishonor of a bill,[4] where the action is brought upon the bill, but not otherwise.[5]

3*d*. *Where from the nature of the action, or indictment, the party must know that he will be charged with the possession of the instrument.*[6]

Thus in an action of trover for the conversion of a bond,[7] or other writing,[8] or in a prosecution for stealing a document no notice to produce is necessary,[9] and this is so even though

If two letters are written at the same time to the same person, one being the exact counterpart of the other, one being sent to the person addressed, and the other retained by the writer, each is an original, and the one retained may be put in evidence by the party who retained it, without notice to the opposite party to produce the other. Hubbard *v.* Russell, 24 Barb. (N. Y.) 404.

[2] Notice to produce a notice, is not requisite to let in evidence of its contents. Atwell *v.* Grant, 11 Md. 101 ; Central Bank *v.* Allen, 16 Me. 41; Fairbault *v.* Ely, 2 Dev. (N. C.) L. 67; Eagle Bank *v.* Chapin, 3 Pick. (Mass.) 180; Falkner *v.* Beers, 2 Doug.(Mich.) 117 ; Christy *v.*Horne, 24 Mo. 242; Leavitt *v.* Simes, 3 N. H. 14; Morrow *v.* Commonwealth, 48 Penn. St. 305 ; Kine *v.* Beaumont, 3 B. & B. 291.

[3] Jory *v.* Orchard, 2 B. & P. 41 ; Calling *v.* Frederick, 6 B. & C. 398; Doe *v.* Somerton, 7 Q. B. 58 ; Phillipson *v.* Chase, 2 Camp. 111.

[4] Swain *v.* Lewis, 26 M. & R. 261; Kine *v.* Beaumont, *ante;* Auckland *v.* Pearce, 2 Camp. 601. The cases overrule Langdon *v.* Hulls, 5 Esp. 156, and Shaw *v.* Markham, Peake, 165.

[5] Lanauze *v.* Palmer, M. & M. 31.

[6] Reliance Lumber Co. *v.* Western Union Tel. Co., 58 Tex. 394; 44 Am. Rep. 622; State *v.* Mayberry, 48 Me. 218; Keller *v.* Savage, 20 Me. 199; Rose *v.* Lewis, 10 Mich. 483; Hart *v.* Robinet, 5 Mo. 11; Neally *v.* Greenough, 25 N. H. (5 Fost.) 325; Hammond *v.* Hopping, 13 Wend. (N. Y.) 505; Hardin *v.* Kretsinger, 17 Johns. (N. Y.) 293; Edwards *v.* Bonneau, 1 Sandf. (N. Y.) 610; Forward *v.* Harris, 30 Barb. (N. Y.) 338; Pickering *v.* Myers, 2 Bailey (S.C.), 113; Hamilton *v.* Rice, 15 Tex. 382; Dean *v.* Border, 15 id. 299.

[7] Hays *v.* Riddle, 1 Sandf. (N. Y.) 248.

[8] Calling *v.* Frederick, *ante.*

[9] Rex *v.* Aickles, 1 Lea. 297 *n;* Rex *v.* Brennan, 3 Cr. & Dix. 109; Com. *v.* Messinger, 1 Binn. (Penn.) 373.

the defendant offers to produce the document.[1] In an action for damages for not delivering a telegram this rule was applied,[2] as also in an action of assumpsit against a carrier for the non-delivery of written instruments.[3]

4th. In odium spoliatoris, notice need not be given to the opposite party to produce a paper of which he has fraudulently or forcibly obtained possession.[4]

5th. Where the party or his attorney has admitted the loss of the paper,[5] because in such case the notice would be nugatory.

But the party cannot excuse himself from giving notice by introducing evidence to show the destruction of a document which has been traced into the possession of his adversary, because the document *may* still be in existence, and his opponent may in any event dispute the fact of its destruction.[6]

Sec. 12. Effect of Notice to Produce Papers.

Papers are not made evidence by a notice calling for their production, and the party calling for them may afterwards waive their production.[7] Nor does it become evidence for the other party, unless from its legal character it is entitled to be used as such ;[8] and it must be proved by the person who offers it in like manner as if he himself had produced it. But if the person producing it is a party to the instrument, or claims a beneficial interest under it, it is *prima facie* to be taken to be duly executed, and may be read without proof

[1] Whitehead *v.* Scott, 1 M. & Rob. 2.

[2] Reliance Lumber Co. *v.* Western Union Tel. Co., *ante*. See Western Union Tel. Co. *v.* Hopkins, 49 Md. 327, *contra;* but the question does not seem to have been much considered by the court.

[3] Jolly *v.* Taylor, 1 Camp. 143. Under this rule it has been held that if an action is brought upon a written contract, which is fully described in the declaration, and the contract is in the possession of the defendant, the plaintiff may introduce secondary evidence of its contents without previously giving a special notice to the defendant to produce it. Dana *v.* Conant, 30 Vt. 246.

[4] Doe *v.* Ries, 7 Bing. 724; Leeds *v.* Cook, 4 Esp. 256.

[5] How *v.* Hall, 14 East, 276; Rex *v.* Haworth, 4 C. & P. 254; Doe *v.* Spitty, 3 B. & Ad. 182; Foster *v.* Pointer, 9 C. & P. 718.

[6] Doe *v.* Morris, 3 Ad. & El. 46.

[7] Blight *v.* Ashley, 1 Pet. (U. S.) 573; Sayer *v.* Kitchen, 1 Esp. 210.

[8] Hylton *v.* Brown, 1 Wash. (U. S.) 343; Sayer *v.* Kitchen, *ante*.

of its execution.[1] The refusal of a party to produce books or papers, upon notice given, does not warrant the presumption that, if produced, they would show the facts to be as alleged by the party giving the notice. The only effect of such refusal is, that parol evidence of their contents may be given; and if such secondary evidence is imperfect, vague, and uncertain as to dates, sums, etc., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence. Some general evidence of such parts of their contents as are applicable to the case must first be given before any foundation is laid for any inference or intendment on account of their non-production.[2] The refusal of a party to produce papers, upon notice, as well as the failure of the party giving the notice to use them, if produced, is a matter for observation to the jury;[3] and if

[1] Rhoades *v.* Lelin, 4 Wash. (U. S.) 715; Betts *v.* Badger, 12 Johns. (N. Y.) 223; Jackson *v.* Kingsley, 17 id. 157.

[2] Life and Fire Ins. Co. *v.* Mechanics' Ins. Co., 7 Wend. (N.Y.) 31; see also Hanson *v.* Eustace, 2 How. (U. S.) 653; Jewell *v.* Center, 25 Ala. 498; Hunt *v.* Collins, 4 Iowa, 56; Spring Garden Mut. Ins. Co. *v.* Evans, 9 Md. 1. Though, where a party has in his possession a deed or other instrument necessary to support his title, and he refuses to produce it, and attempts to make out his title by other evidence, such refusal raises a strong presumption that the legitimate evidence would operate against him, yet this rule is not applicable to such documents as he has no right to give in evidence without the consent of the adverse party, the only effect of the refusal, in such case, being to authorize the adverse party to give secondary evidence of the contents of the documents withheld. Merwin *v.* Ward, 15 Conn. 377. When a party refuses to produce books and papers which are shown to be in his possession, his opponent may give secondary or parol proof of their contents; and if such secondary evidence is imperfect, vague, and uncertain as to dates, sums, boundaries, etc., every intendment and presumption shall be against the party in possession of the higher evidence, and refusing to produce it. Rector *v.* Rector, 8 Ill. 105; Shortz *v.* Unangst, 3 Watts & S. (Penn.) 45. Of course, in order to make secondary evidence admissible because of a failure to produce a writing, it must be shown that the writing is actually in his custody, or at least is one of which he is entitled to the custody. Thus, notice to the opposite party to produce a *fi. fa.* is not foundation sufficient to admit a copy in evidence. Bell *v.* Chandler, 23 Ga. 356.

[3] Bate *v.* Kinney, 1 C., M. & R. 41; see Sayer *v.* Kitchen, 1 Esp. 235, as to failure of party giving notice to use the papers when produced; and see also Wilson *v.* Bower, 1 C. & P. 10; Wharam *v.* Routledge, 5 Esp. 235.

the papers are shown to be in the possession or subject to the control of the party upon whom the notice is served, the failure to produce them will warrant the court in instructing the jury that they may, from such failure, presume that the papers or books, if produced, would operate unfavorably to his cause.[1] Notice to produce a paper will not entitle the person giving it to cross-examine a witness as to its contents,[2] except after refusal to produce.[3] If the party refuses to produce the paper for the use of the party giving the notice, he cannot afterwards use the original either to contradict the secondary evidence,[4] or to show that there are attesting witnesses who ought to be called,[5] or to refresh the memory of witnesses,[6] or, it seems, for any purpose,[7] but is in effect bound by any legal and satisfactory evidence given on the other side relating thereto,[8] unless he has some sufficient and satisfactory excuse for not complying with the notice.

In order to render a notice operative to let in secondary evidence, it must be shown that the original instrument is in the hands of the opposite party or of those in privity with him. The nature of this evidence must vary according to the nature of the instrument, and where it belongs exclusively to the party, slight evidence will suffice.[9] If the instrument has been delivered to a third person, in privity

[1] Clifton *v.* United States, 4 How. (U. S.) 242.

[2] Graham *v.* Dyster, 2 Stark. 23.

[3] Id.

[4] Thompson *v.* Hodgdon, 12 Ad. & El. 135.

[5] Edmonds *v.* Challis, 7 C. B. 413; Jackson *v.* Allen, 3 Stark. 74.

[6] Till *v.* Ainsworth, WILDE, C. J., *MS.*, Bristol, 1874.

[7] Collins *v.* Garbon, 2 F. & F. 47.

[8] But now in England, by Rules O XXXI and 14, it is provided that "every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice." Rules 15, 16 regulate the procedure under this rule.

[9] Henry *v.* Leigh, 3 Camp. 502.

with the party, notice to the latter is sufficient,[1] as also is notice to his attorney.[2] Notice to a party to produce a check, or a note which has been paid, which is in the hands of his banker, is sufficient,[3] or to produce papers belonging to him which are in the hands of his attorney ;[4] and the same rule prevails when, although the paper is in the hands of a third person, it is subject to the control of the party, but not when the third person has a lien thereon, or from any cause the party is not entitled to its possession.

If, at the time the notice was served, the paper was in the hands of the party, he cannot afterwards get rid of it so as to avoid the effect of the notice.[5] But if the plaintiff becomes nonsuited in the action after the service of the notice and after the nonsuit, the party assigns the paper to a third person, and upon a second trial the plaintiff again serves notice upon him to produce the paper, secondary evidence of its contents will not be admissible ;[6] and the same has been held where, before notice was served, the paper was delivered to a third person, under whom the defendant justified in an action of trespass, and that a subpœna *duces tecum* to such third person was necessary.[7]

Sec. 13. How the Contents of Writings may be proved.

It is said that, as a general rule, there are no degrees in secondary evidence,[8] and that upon proof of the loss or destruction of a writing, or upon the failure of the opposite party to produce it upon notice, the contents of the writing may be proved even by parol,[9] and the party is not bound to show that no copy of the writing exists. But he must produce satisfactory evidence of the contents of the writing,

[1] Baldney *v.* Ritchie, 1 Stark. 338.
[2] Taplin *v.* Atley, 3 Bing. 164; Suter *v.* Burrell, 2 H. & N. 867.
[3] Partridge *v.* Coates, Ry. & M. 156.
[4] Irwin *v.* Lever, 2 F. & F. 295.
[5] Knight *v.* Martin, Gow. 104 ; Sinclair *v.* Stevenson, 1 C. & P. 585.
[6] Knight *v.* Martin, *ante.*
[7] Evans *v.* Sweet, Ry. & M. 183.
[8] Carpenter *v.* Dame, 10 Ind. 125.
[9] Granger *v.* Warrington, 8 Ill. 299 ; Jackson *v.* Cullam, 2 Blackf. (Ind.) 288 ; Young *v.* Buckingham, 5 Ohio, 485 ; Gore *v.* Elwell, 22 Me. 442 ; Clark *v.* Trindle, 52 Penn. St. 492 ; Thayer *v.* Stearns, 1 Pick. (Mass.) 109 ; Denton v. Hill, 4 Hayw. (Tenn.) 73 ; Small *v.* Pennell, 31 Me. 267 ; Sanders *v.* Sanders, 24 Ind. 133 ; Jones *v.* Fayles, 5 Mass. 101.

and there can be no question but that a well authenticated copy is the most satisfactory substitute for the original document. But no copy whatever is admissible, unless its accuracy is sworn to, or there is some presumption attached to it from which its accuracy may be presumed,[1] as is the case in reference to a very old instrument purporting to be a copy or abstract of a conveyance,[2] when it can be traced to the custody of some grantee of the lands, but not where they come from a custody unconnected with the lands.[3] A copy of a letter taken by a copying machine, although still only a copy, will be presumed to be correct.[4] And such, also, is the rule as to entries made by a deceased clerk in a letter book, when it is shown that in the course of business, letters relating to the business of the plaintiff were copied in the letter book by such clerk.[5] The rule allowing the production of copies or parol evidence where the original is lost or destroyed, or is in the possession of the opposite party, who, upon notice, neglects to produce it, applies to all classes of instruments, as records of judgments,[6] executions,[7] wills,[8] account books,[9] writs or other process,[10] bonds[11] and other specialties,[12] contracts or agreements,[13]

[1] Fisher *v.* Samuda, 1 Camp. 190.

[2] Price *v.* Woodhouse, 3 Exch. 616; Buller's N. P. 254; Bullin *v.* Michel, 2 Price, 399; Williams *v.* Wilcox, 8 Ad. & El. 314.

[3] Potts *v.* Durant, 3 Anst. 789, Paddock *v.* Whitcomb, 6 Exch. 601.

[4] Hadin *v.* Murray, 3 Camp. 228; Simpson *v.* Thorneton, 1 F. & F. 452. In Sturge *v.* Buchanan, 10 Ad. & El. 598, it was held that a letter book containing copies of letters which the defendant wrote to a third person, consented to admit under a notice to produce the letters, would be presumed to contain true copies of the letters.

[5] Pritt *v.* Fairclough, 3 Camp 305; Hagedorn *v.* Reed, 3 id. 377.

[6] Jackson *v.* Cullam, 2 Blackf. (Ind.) [illegible]; Pruden *v.* Allen, 23 Pick. (Mass.) 184; Sanders *v.* Sanders, 24 Ind. 133; Small *v.* Pennell, 31 Me. 267; Lane's Will, 2 Dana (Ky.), 106; Clark *v.* Trindle, 52 Penn. St. 492; Farmers' Bank *v.* Gibson, 6 id. 51; Young *v.* Buckingham, 5 Ohio, 485.

[7] Ellis *v.* Huff, 29 Ill. 449.

[8] Lane's Will, *ante;* Smith *v.* Carter, 3 Rand. (Va.) 169.

[9] Keaton *v.* Davis, 18 Ga. 457 *n.*

[10] Fowler *v.* Moore, 4 Ark. 570; Brown *v.* Richmond, 28 Vt. 583; Allen *v.* State, 21 Ga. 217; Derret *v.* Alexander, 25 Ala. 265; Bartlett *v.* Hunt, 17 Wis. 214; Com. *v.* Raank, 8 Cush. (Mass.) 210.

[11] Stakes *v.* Prescott, 4 B. Mon. (Ky.) 37.

[12] Kelly *v.* Riggs, 2 Ratt. (Conn.) 126.

[13] Gwattney *v.* Wheeler, 26 Ind. 415; Morrison *v.* Chapin, 97 Mass. 72.

deeds,[1] patents,[2] or indeed any instrument in writing which has been lost or destroyed,[3] or as to *parts* of such instruments which have been mutilated so as to be illegible.[4]

There are four classes of copies which may be used to prove the contents of documents, and their value as such proof is in the order in which they are given: *Exemplified*, *Office*, *Certified* and *Examined*. *Exemplified* copies are those which are attested under the great seal, or under the seal of the court in which the record is preserved.

An *office* copy is a copy made by the officer having the custody of the document in the same court, and in the like cause, and is equivalent to the original document of which it is a copy.[5] In this country, however, "office copies" include all certified copies made by officers, whether of courts or otherwise, who by law are made certifying officers, and copies, made by whom, and certified, are made admissible in evidence. In other words, "office copies" include "certified copies."

A *certified* copy is a copy made by an officer having the custody of a document or of a record, and certified by him to be correct. Where the statute makes such person a certifying officer, and provides that copies certified by him shall be evidence, such copies, in degree, stand next to the original instrument.

An *examined* copy is a copy of an instrument, verified by the oath of a witness who has compared it with the original, word for word and line for line, and swears that it is correct.[6] The copy must be exact, and must not con-

[1] In McBurney *v.* Cutler, 18 Barb. (N. Y.) 203, it was held that, to prove the execution of an alleged lost deed, it is not necessary to prove by a witness that he remembered having seen a seal on it; the fact might be shown by other and circumstantial evidence; and evidence that the instrument was executed, and intended, and purported to convey lands, and in connection with it, evidence of the declarations of the grantor that he had conveyed lands, is evidence proper to go to a jury, and is sufficient to authorize them, if the testimony is believed, to find that the instrument was under seal.

[2] Long *v.* Davis, 4 Mich. 140.

[3] Adams *v.* Guice, 30 Miss. 397; People *v.* Dennis, 4 Mich. 609; Orm *v.* Cook, 31 Ill. 283.

[4] Fullis *v.* Griffith, Wright (Ohio), 303.

[5] Lucas *v.* Fulford, 2 Burr. 1179.

[6] Reid *v.* Margison, 1 Camp. 469.

tain abbreviations which are not in the original,[1] and some evidence must be given to show that it was copied from the original,[2] as a copy of a copy is never admissible,[3] except in those instances where the copy from which the copy is made possesses the essential elements of the original, as, a copy from a certified copy made by a certifying officer,[4] or from a press copy of a letter,[5] because in the latter instance the signature is in the handwriting of the person writing it, thus making it possible to authenticate the genuineness of the instrument from which the second copy was made.

For instances in which copies are admissible, and what kind of copies must be used, and how proved, see chap. —, "*Documentary Evidence.*"

[1] Rex *v.* Christian, C. & M. 388.

[2] Adamthwayte *v.* Sym, 4 Camp. 372.

[3] Brown *v.* Warren, &c., R. R. Co., 5 Gray (Mass.), 35. But this rule does not apply to a certified copy of a recorded deed Stetson *v.* Gulliner, 2 Cush. (Mass.) 494, nor to one sworn to be correctly made from a press copy of a letter Goodrich *v.* Weston, 102 Mass. 362.

[4] Stetson *v.* Gulliner, *ante.*

[5] Goodrich *v.* Weston, *ante.*

CHAPTER II.

PAROL EVIDENCE, RULES RELATING TO.

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Sec. 14. General Rule.

It is a general rule, so well settled and so universal in its application, that, in the absence of any latent ambiguity therein, *parol evidence is not admissible to explain, vary or contradict a written instrument*, that it might seem almost superfluous to state it here.[1] This is a rule of the common law, but the Statute of Frauds also requires that certain contracts shall be in writing, and thus, by implication, excludes all evidence relating to contracts which are not in writing.[2] So, too, in other cases, it is the duty of certain officers to record, in a manner more or less solemn, what is said or done, as in the case of records of courts of law, or depositions taken before magistrates in criminal cases. How far such authentic memorials are conclusive is not very well settled, but they are certainly so in some cases. It is obvious that evidence might frequently be objected to as infringing more than one of these rules, and, where several objections might be good it is not always easy to see which of the two, in a given case, forms the *ratio decidendo*.

So, too, it may be said that, although the principles upon which the admissibility of evidence depends would appear

[1] Albert *v.* Zeigler, 29 Penn. St. 50; Shankland *v.* Washington, 5 Pet. (U. S.) 390; Peter *v.* Grover, 20 Mo. 363; Wade *v.* Odeneal, 3 Dev. (N. C.) L. 423; Warren *v.* Crew, 22 Iowa, 315; Huffman *v.* Hannuer, 17 N. J. Eq. 269; Ferguson *v.* Glaze, 12 La. An. 667; Herndon *v.* Henderson, 41 Miss. 584; Smith *v.* Higbee, 12 Vt. 113; Irwin *v.* Ivers, 7 Ind. 308; Wynn *v.* Cox, 5 Ga. 373; Young *v.* Frost, 5 Gill (Md.), 287; Smith *v.* McCall, 1 McCord (S. C.), 220; Reed *v.* Jones, 8 Wis. 392; Hoxie *v.* Hodges, 1 Oregon, 251; Lenhard *v.* Vischer, 2 Cal. 37; Richardson *v.* Comstock, 21 Ark. 69; Grundy *v.* Edwards, 7 J. J. Mar. (Ky.) 67; Robinson *v.* Mogandy, 28 Ill. 423; Beckley *v.* Munson, 22 Conn. 299; West *v.* Kelly, 19 Ala. 353; Gooch *v.* Cannon, 8 Mo. 391; Tits *v.* Brown, 20 N. H. 393; Hall *v.* Adams, 1 Hill (N. Y.), 601.

[2] Northrup *v.* Jackson, 13 Wend. (N. Y.) 85; Lecroy *v.* Wiggins, 31 Ala. 13; Lackett *v.* Lobey, 10 La. An. 713; Martin *v.* Duffey, 4 Phil. (Penn.) 75.

to be general as regards all written instruments, they have not been applied in a precisely similar manner to all classes of cases. But perhaps this may be partly explained by the circumstances that, inasmuch as the question is, whether the written memorandum *by its terms* excludes oral evidence, the admissibility of the latter is in all cases, to a certain extent, and in some exclusively, a question of *interpretation* of the written document. And inasmuch as, in analogy to the use of technical terms, language acquires a conventional meaning, such groups of cases as have been mentioned, arise. In fact there are *two* questions of interpretation to be solved whenever oral evidence is objected to on the ground that it contradicts a written instrument:

FIRST, *The interpretation of the contract as it stands;* and SECOND, *the interpretation of the clause which it is proposed to insert by way of addition or explanation*, for that is really what is done, and this explains how it is that the same question as that which is raised upon the admissibility of evidence is sometimes raised upon demurrer. Under a system of law like ours, in which there are scarcely any canons of interpretation, and where contracts are loosely drawn, a decision as to the meaning of one contract is rarely an authority as to the meaning of another.

Bearing these remarks in mind, it will be found that the apparent conflict between many of the cases can be reconciled.

Sec. 15. Latent Ambiguities, what are, rule as to.

Under the general rule as stated *supra*, it follows as a matter of course, that, *whenever there is a complete written agreement all previous conversations and verbal agreements of the parties are merged therein*, and cannot be shown to alter or vary the writing[1] or to show the intention of the par-

[1] Smith *v.* Higbee, 12 Vt. 113; Cole *v.* Spann, 13 Ala. 537; Herndon *v.* Henderson, 41 Miss. 584; Vaughn *v.* Lynn, 9 Md. 870; Dean *v.* Mason, 4 Conn. 428; Chadwick *v.* Perkins, 8 Me. 399; Crosier *v.* Acor, 7 Paige (N. Y.) Ch. 137; French *v.* Turner, 15 Ind. 59; Walker *v.* Engler, 30 Mo. 130; Mead *v.* Steger, 5 Port. (Ala.) 498; Cox *v.* Bennett, 13 N. Y. L. 165; Logan *v.* Bond, 13 Ga. 192; Downie *v.* White, 12 Wis. 176; Stevens *v.* Cooper, 1 John. (N. Y.) Ch. 425; Caldwell

ties,[1] except when there is a *latent* ambiguity in the contract.[2] As where a word is used in a contract which the court is unable to construe without explanation, it is proper to admit evidence of the *peculiar* use and meaning which the word has acquired by usage in a particular business to which the contract relates, or in the locality in which it is used;[3] as, to show

v. May, 1 Stew. (Ala.) 425; Gelpcke *v.* Blake, 15 Iowa, 387; Cincinnati, &c., R. R. Co. *v.* Peaver, 28 Ind. 502; Walker *v.* Engler, 30 Mo. 130. A contract which the parties *intended* to but did not make, cannot be shown in place of the one which they did make, Sanford *v.* Howard, 29 Ala. 684; Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19; nor can a verbal agreement differing from a written one, entered into before or at the time the written agreement was executed, be given in evidence to supersede or vary the written contract in any of its terms, Cincinnati, &c., R. R. Co. *v.* Pearce, 28 Ind. 502; Gelpcke *v.* Blake, 15 Iowa, 387; Jack *v.* Naber, 15 id. 450; Downie *v.* White, 12 Wis. 176; nor can evidence of a party's admission be shown to vary a written contract, Fitz *v.* Brown, 20 N. H. 393; Hale *v.* Handy, 36 id. 206; nor can the acts of parties be proved to show what construction they placed upon an ambiguous contract, Giles *v.* Comstock, 4 N. Y. 270; the writing itself, in such cases, is the exclusive evidence of the intention of the parties, Miller *v.* Fitchorn, 31 Penn. St. 252.

[1] Pullen *v.* Le Roy, 10 Bos. (N. Y.) 38; Bedford *v.* Flowers, 11 Humph. (Tenn.) 242; Ellmaker *v.* Franklin Ins. Co., 5 Penn. St. 183; Pilmer *v.* Branch State Bank, 16 Iowa, 321.

[2] Gallagher *v.* Black, 44 Me. 99. In order to properly understand the application of this rule, it should be understood that there are two kinds of ambiguities—*Latent* and *Patent*. A latent ambiguity is one which does not appear upon the face of the instrument, but arises from an application of the instrument to the subject-matter of the contract, or where it may be applied to either of two persons or things, or may be construed in either of two ways. A patent ambiguity is one which appears upon the face of the instrument, and, from a mere perusal, shows that something is omitted which must be added before it can be ascertained what is meant. Parol evidence is admissible to explain latent ambiguity. McNair *v.* Sales, 5 Minn. 435; Hartwell *v.* Canman, 10 N. J. Eq. 128; Hall *v.* Davis, 36 N. H. 569; Wilson *v.* Robertson, 7 J. J. Mar. (Ky.) 78; Patrick *v.* Grant, 14 Me. 233; Shuetze *v.* Bailey, 40 Mo. 69; Spears *v.* Ward, 48 Ind. 541; Clark *v.* Hart, 49 Ala. 86; Wilson *v.* True, 36 Cal. 606; Mastens *v.* Freeman, 17 Ohio St. 373; Crawford *v.* Brady, 35 Ga. 184; Hotchkiss *v.* Barnes, 34 Conn. 27; Doyle *v.* Estornet, 13 La. An. 318. But not to explain a *patent* ambiguity. Panton *v.* Tefft, 22 Ill. 366; Mithoff *v.* Bryne, 20 La. An. 363; Rawyer *v.* Martin, 6 Rand. (Va.) 525; Morris *v.* Edwards, 1 Ohio, 184.

[3] Cowles *v.* Garrett, 30 Ala. 341; Barron *v.* Placide, 7 La. An. 229; Hart *v.* Hammett, 18 Vt. 127; Hulbert *v.* Cowen, 37 Barb. (N. Y.) 62; Ganson *v.* Madigan, 15 Wis. 144; Colwell *v.* Lawrence, 24 How. Pr. (N. Y.) 324; Smith *v.* Clayton, 29

what is meant by the words "good merchantable shipping hay,"[1] "good custom cowhide boots,"[2] or "a farm," or a "homestead farm" in a lease,[3] or that a right to "deepen a ditch" includes the right to widen it,[4] or the "usual and customary method of engaging and paying a fishing crew," to establish the kind of voyage contemplated,[5] to show what particular word an abbreviation was intended to represent,[6] to show what is meant by the word "team" in a contract,[7] or by "damages of the river" in a bill of lading,[8] or the number of hours regarded as a "day's work" in a particular trade,[9] or that contracts of certain description, by the custom of a particular business, are regarded as bonds,[10] or the meaning of the word "currency" when used in a note or contract,[11] the words "on margin" in a broker's contract

N. J. L. 357; Locke *v.* Rowell, 47 N. H. 46; Fitch *v.* Carpenter, 43 Barb. (N. Y.) 35; Stone *v.* Bradbury, 14 Me. 185; Myers *v.* Walker, 24 Ill. 133; Williams *v.* Wood, 16 Md. 220; Wayt *v.* Fairbanks, 1 Brayt. (Vt.) 77; Hite *v.* State, 9 Yerg. (Tenn.) 357; Brown *v.* Brooks, 25 Penn. St. 210; Stewart *v.* Smith, 28 Ill. 397. The rule that courts are to give construction to contracts is frequently departed from, where the contracts relate to the scientific or mechanic arts, or contain words of a technical or local signification. In such cases, it is common and prudent to admit the opinions of experts, to explain the contract. Reynolds *v.* Jourdan, 6 Cal. 108; Myers *v.* Walker, 24 Ill. 133; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332; Prather *v.* Ross, 17 Ind. 495; Taylor *v.* Sototing, 6 La. An. 154; Broadwell *v.* Broadwell, 1 Gill (Md.), 599; Williams *v.* Woods, 16 Md. 220; Smith *v.* Clayton, 29 N. J. L. 357; Stroud *v.* Frith, 11 Barb. (N. Y.) 300; Hulbert *v.* Cawer, 37 id. 62; Colwell *v.* Lawrence, 24 How. (N. Y.) P. 324; Brown *v.* Brooks, 25 Penn. St. 210; Cary z. Bright, 58 id. 70; Harb *v.* Hammett, 18 Vt. 127. While parol evidence, to show that the parties to an instrument placed upon a certain word or phrase a meaning controlling the whole effect of an instrument, is not admissible, yet such evidence to show the scientific as well as popular meanings of such words, is admissible. Hartwell *v.* Camman, 10 N. J. Eq. 128.

[1] Fitch *v.* Carpenter, 43 Barb. (N. Y.) 40.

[2] Wait *v.* Fairbanks, *ante.*

[3] Locke *v.* Rowell, 47 N. H. 46.

[4] Collins *v.* Driscoll, 34 Conn. 43.

[5] Eldridge *v.* Smith, 13 Allen (Mass.), 140.

[6] Hite *v.* State, 9 Yerg. (Tenn.) 357.

[7] Gansan *v.* Madigan, 15 Wis. 144.

[8] Sampson *v.* Gazzam, 6 Port. (Ala.) 123.

[9] Barnes *v.* Ingalls, 39 Ala. 193. In this case among "photographers." See also Hinton *v.* Locke, 5 Hill (N. Y.), 437, in the case of carpenters, and also as to extra pay for more hours' work.

[10] Stone *v.* Bradbury, 14 Me. 185.

[11] Pilmer *v.* State Bank, 16 Iowa, 321. But not what is meant by "current funds." Osgood *v.* Mc-

relating to the sale or purchase of stock.[1] So, where a farmer contracted in writing to sell "his wool" to a certain person at a certain price, it was held that evidence was admissible to prove that "his wool" meant the wool in his possession bought by him of other farmers as well as wool of his own growth, but was not admissible to prove that only a limited quantity of such wool was intended to be bought.[2] In this case, evidence of previous conversations between the parties was admitted to show that the plaintiff had some wool of his own clip, and some which he had purchased, which he was offering for sale. The object of the evidence was to show in what sense the defendant used the term "my wool," by showing by their previous negotiations that, at the time the offer by letter was made, he did not refer to the wool from the plaintiff's clip merely, but to all the seller had on hand. LORD CAMPBELL said: "There cannot be the slightest objection to the admission of evidence of previous conversations, which neither alters nor adds to the written contract, but merely enables us to ascertain what was the subject-matter referred to therein." In a Vermont case[3] there was a sale of "winter-strained lamp oil" equal to a sample exhibited. The evidence disclosed that there were two kinds of oil of the kind sold, one *sperm* oil, the other *whale* oil, the latter of which was inferior in quality. The court held that evidence was admissible to show that in conversation *at the time the contract was made* this was explained to the purchaser,

Connell, 32 Ill. 74; Ehle *v.* Chittenango Bank, 24 N. Y. 548; Marc *v.* Kupper, 34 Ill. 287.

[1] Hatch *v.* Douglass, 48 Conn. 116; 40 Am. Rep. 154. In this case the defendant wrote the plaintiff: "I want to buy, say one hundred shares of Union Pacific stock on margin." CARPENTER, J., said: "What does that mean? Those unacquainted with the business would not understand its meaning from the language. It is not to be presumed that the court understood it. The plaintiff produced witnesses who were familiar with the business, and who knew from experience and observation the meaning attached to the words to prove their meaning. The defendant objected, but the court admitted the evidence, and, we think, properly. Nelson *v.* Sun Mutual Ins. Co., 71 N. Y. 453. It was in the nature of a *technical phrase*, the meaning of which must be understood before the court could know what the contract between the parties really was."

[2] Macdonald *v.* Longbottom, 1 E. & E. 987; see also Buxton *v.* Rust, L. R., 7 Exch. 280.

[3] Hart *v.* Hammett, 18 Vt. 127.

and that he was then informed that it was not *sperm* oil he was buying. In an Alabama case,[1] during the Rebellion, a contract was entered into to pay "dollars," and parol evidence was held to be admissible to show the circumstances under which the contract was made, and that in fact, at that time and place, the only "dollars" in use were Confederate dollars. But the doctrine of this case is very questionable, and it is not believed that the courts would be inclined to follow it. It does not come within the principle of the other cases cited, and it cannot be said that the evidence created any latent ambiguity. A contract to pay "dollars" is a contract to pay lawful money, and evidence is never admissible to show that it was intended as a contract to pay money of a particular kind or quality; and the rule adopted in the case cited would overturn the whole law of contracts, and place it within the power of a party to completely nullify his contract by showing that it was really a contract to pay in a worthless currency. So, in construing a written contract of service under which A. was "to enter into the employ" of B., or A. was "to give the whole of his services to B.," it was held that parol evidence was admissible to show in what capacity A. was to serve,[2] and this, even though the Statute of Frauds required a written contract.[3] The object and effect of such evidence is not to alter or vary the meaning of the contract, but rather to develop and ascertain the meaning of the term by ascertaining the sense in which the parties intended to use it. Thus, in a contract for stone at a certain price "per perch," it being doubtful whether $16\frac{1}{2}$ or 25 feet constituted a perch, and the evidence being conflicting, in order to ascertain the intention of the parties, the defendant was permitted to show that the word "perch" was not used by either of the parties, but that they verbally agreed upon 18 cents per cubic foot as the price of the stone, and that the attorney employed to reduce the contract to writing, of his own motion, and without instructions from

[1] Thorington *v.* Smith, 8 Wall. (U. S.) 1.

[2] Mumford & Gething, 7 C. B. N. S. 305; Price *v.* Mount, 11 id. 508.

[3] Chadwick *v.* Burnley, 12 W. R. 1077.

either party, made the change from feet to perch, and the price from 18 cents per foot to $4.50 per perch, this being the rate if 25 feet is a perch; but if 16½ feet is a perch, the rate would be 27 cents per foot.[1] And generally it may be said that *parol evidence is admissible to identify and apply the subject-matter of the contract*,[2] but not where the writing

[1] Quarry *v.* Clements, 38 Ohio St. 587.

[2] Miller *v.* Stevens, 100 Mass. 518; Caulkins *v.* Hellman, 14 Hun (N.Y.), 330; Sweet *v.* Shumway, 102 Mass. 357; Bateman *v.* Phillips, 15 East, 272; Shortred *v.* Check, 1 Ad. & El. 57; Stoops *v.* Smith, 100 Mass. 63; Gerrish *v.* Towne, 3 Gray (Mass.), 82; Sargent *v.* Adams, 3 id. 72. It is well settled that parol evidence is always admissible for the purpose of applying a written instrument to its proper subject-matter. Bennett *v.* Pierce, 28 Conn. 315; Noonan *v.* Lee, 2 Black (U. S.), 499; Myers *v.* Laird, 26 Ill. 415; Cary *v.* Thomson, 1 Daly (N. Y.), 35; Almgren *v.* Dutilh, 5 N. Y. 28; Mayor *v.* Butler, 1 Barb. (N. Y.) 325; Waters *v.* Simmons, 7 Jones (N. C.) L. 541; Hildebrand *v.* Togle, 20 Ohio, 147; Morgan *v.* Spangler, 14 Ohio St. 102; Barnhart *v.* Riddle, 23 Penn. St. 93; Aldridge *v.* Eshleman, 46 id. 420; Gould *v.* Lee, 55 id. 99; Ames *v.* St. Paul, &c., R. R. Co., 12 Minn. 412. Thus, upon the trial of an indictment for the defendant's neglect of duty as overseer of the Cane Hill road, it was held to be error to exclude parol evidence offered to show that the Cane Hill road was the same established by the county court, under a different description. State *v.* Hapgood, 23 Ark. 553. So, where a tract of land is described differently in different instruments, it may be shown by parol that the different descriptions refer to the same tract, the rule being that extrinsic evidence may properly be resorted to, in order to show the usage of a business, or the use and nature of certain kinds of property, viewed with reference to its application, or the interests to which it may be subservient. Stewart *v.* Chadwick, 8 Iowa, 463. So parol evidence has been held admissible to explain a written agreement between a canal company and a farmer, so far as to give identity to the subject-matter of the contract, and to apply it. Bartsch *v.* Lehigh Co., 4 Rawle (Penn.), 130; to identify a tract described in a conveyance, Hughes *v.* Sandal, 25 Tex. 162; to identify the articles meant to be conveyed by a bill of sale concluding with the words: "meaning all the farming tools, etc., now owned by him, and on said farm," Rugg *v.* Hale, 40 Vt. 138; to identify mortgaged wood from other wood piled upon the same lot, Sargeant *v.* Solberg, 22 Wis. 132; see also Brooks *v.* Aldrich, 17 N. H. 443; to identify the particular animals intended, under a written contract for the sale of a certain number of hogs, Marshall *v.* Gridley, 46 Ill. 247; to show the identical monument referred to in a deed, Afferty *v.* Connover, 7 Ohio St. 99; to identify a note secured by mortgage other than its correspondence with the description given of it in the condition of the mortgage, Melvin *v.* Fellows, 33 N. H. 401; to show what parcel of land fits all parts of a deed or other instrument, Doe *v.* Roe, 20 Ga. 689; to identify the subject-matter of a recorded note of a cor-

distinctly defines the property so as to admit of its being applied thereto without the aid of such proof.[1] So such evidence is admissible to identify the parties to an instrument or record, as where there are two persons by the same name, to show which was intended;[2] or to show that the payee of notes is not the real party in interest, as that a contract made by A. in his own name, was made as the agent of B.;[3] or that goods purchased in his own name were purchased on joint account;[4] or who is the payee in a promise to pay for a charitable purpose;[5] or that a gift, although jointly to husband and wife, was intended to operate only as a gift to the wife;[6] to show that the parties in a former suit are the same as the one on trial;[7] or to show the identity of the parties in one record with those of another.[8] So to show, under a guaranty to "J. H., President," that J. H. is, or was when the writing was executed, the president only of a certain bank, and the guaranty will then enure to that bank.[9] And, generally, where there is sufficient, on the face of negotiable paper, to create a doubt to whom the credit was given, then, as between the original parties, parol evidence is admissible to remove that doubt. Thus, a signature "A. B., captain," on a bill of exchange, not clearly importing a liability of the agent or of the principal, parol evidence by the plaintiff is admissible, the contract being unsealed, to show that it was intended to bind the owner, the principal, and that he had authorized the captain to bind him in that form.[10] So an administration which would be deemed *prima facie* to be granted upon the estate of a father, may be shown to

poration, Pope *v.* Machias, &c., Co., 52 Me. 535.

[1] Pike *v.* Fay, 101 Mass. 134; Hart *v.* Hammett, 18 Vt. 127; Hill *v.* Rowe, 11 Met. (Mass.) 268.

[2] State *v.* Weare, 38 N. H. 314; Sawyer *v.* Boyle, 21 Tex. 28; Walker *v.* Wells, 25 Ga. 141; Simons *v.* Marshall, 3 Greene (Iowa), 502; Tuggle *v.* McMath, 38 Ga. 648.

[3] Lerned *v.* Johns, 9 Allen (Mass.), 419; Oelrichs *v.* Ford, 21 Md. 489; Westhaltz *v.* Retaud, 18 La. An. 245.

[4] Scott *v.* McKinney, 98 Mass. 344.

[5] Hopkins *v.* Upshur, 20 Tex. 89.

[6] Dunham *v.* Chatham, 21 Tex. 231.

[7] Shirley *v.* Fearne, 33 Miss. 653.

[8] Garwood *v.* Garwood, 29 Cal. 514.

[9] State Bank *v.* Peck, 28 Vt. 200.

[10] May *v.* Hewitt, 33 Ala. 161.

be granted upon the estate of the son, the names of the two being the same.[1] Where a certificate of deposit is taken by a guardian in his own name, parol evidence is admissible, on a settlement of his accounts, to show that the money deposited belonged to the ward, and the certificate is admissible to prove the investment.[2] In an action of ejectment, where the plaintiff claimed under a grant from the State to Elias Nicks and by a grant to himself from Eli Nicks, parol evidence was held admissible to show the identity of the person variously named.[3] So where the name of the vendee in the body of the act of sale was omitted, the notary and one of the witnesses to the act were offered to prove that H. T. W., whose name was subscribed, together with that of the vendor, was the purchaser, it was held that the omission could be supplied by such parol evidence.[4] The addition to the name signed to a contract, of the official character of the person so signing, is such an indication of the representative character of such signer, as will warrant a resort to parol evidence to prove extrinsic circumstances, such as, to whom the consideration passed and credit was given, the agent's authority, etc., by which the respective liability of the principal and agent may be determined.[5]

This species of evidence does not impugn the general rule, because it does not alter or vary the terms of the contract, but merely explains that portion of it which is still in doubt,[6] and enables the court to apply it, according to the real intent of the parties. The circumstance that the language used in a contract, which is susceptible of either of two constructions, was understood in one sense by one of the parties, and in another sense by the other, does not change the rule. In such a case, the sense in which the word is used in that class of contracts, or in view of the circumstances attending the transaction,

[1] Moseley *v.* Mastin, 37 Ala. 216.

[2] Beasley *v.* Watson, 41 Ala. 234.

[3] Henderson *v.* Hackney, 23 Ga. 383.

[4] Beauvais *v.* Wall, 14 La. An. 199.

[5] Smith *v.* Alexander, 31 Mo. 193.

[6] Gallagher *v.* Black, 44 Me. 99. In Graham *v.* Hamilton, 5 Ired. (N. C.) L. 428, it was held that when a writing is deficient in punctuation, and its sense may be varied as the punctuation is one way or another, extrinsic evidence may be introduced to explain its meaning.

must prevail. Thus, in a Connecticut case [1] before cited, in which the defendant wrote the plaintiff: "I want to buy, say one hundred shares Union Pacific on margin," it was said that the parties did not understand the phrase alike, the defendant supposing that he risked nothing, while the plaintiff understood that he assumed a personal liability as well. "The language," said CARPENTER, J., "is that of the defendant. He used a phrase peculiar to the plaintiff's business, knowing that they would understand its meaning as used in that business. In such case, if the parties did not understand it alike, it must be interpreted in the sense in which the plaintiff understood it. If the defendant chooses to use a technical term which has a clearly defined and well understood meaning in the business to which it relates, and the plaintiff, giving it that meaning, act upon it, he cannot be permitted, to the prejudice of the plaintiff, to say that he used it in a different sense. He left it to be interpreted by usage, and by that interpretation he is concluded."

But it must be remembered that *where words used in a contract have a well defined meaning, and are not used in a technical sense, proof of a meaning acquired by them in a certain trade by usage is not admissible to put upon them a different meaning.*[2] Thus it has been held, that where a bond is made payable in "current money of Philadelphia," parol evidence is not admissible to show that it was intended to be paid in specie,[3] or the meaning of the words "more or less" in a contract, because, in the absence of any general or special usage giving to them a different signification, the words have a definite meaning, and oral proof is not admissible to show that the parties intended to use them in a different sense.

Where the terms of a written contract are not perspicuous, but are susceptible of two meanings, parol evidence is admissible to ascertain the intention of the parties,[4]

[1] Hatch *v.* Douglass, 48 Conn. 116; 40 Am. Rep. 154.

[2] Smith *v.* Battams, 26 L. J. Exch. 32; Parkinson *v.* Collier, Park on Ins. 416.

[3] Bond *v.* Hans, 2 Dall. (U. S.) 133.

[4] Hueske *v.* Broussard, 55 Tex. 201; Mason *v.* Ryas, 26 Kan. 464; Knick v. Knick, 75 Va. 12.

and to that end it is, as we have seen, competent to show that the words used have by usage acquired a peculiar meaning different from their ordinary sense, and also the circumstances attending the transaction and the situation and admissions of the parties for the purpose of ascertaining the sense in which they intended the language used.[1] Thus, where on the face of the writing it is doubtful whether a guaranty is continuing, or limited to a single transaction, evidence of the circumstances under which the guaranty was given, the nature of the business in which the credit was to be used, the situation and relation of all the parties, and their previous dealings and negotiations which led to the giving of the guaranty, may be shown to enable the court to ascertain the true intent and meaning of the parties.[2] So, too, where a bill is drawn by a corporation, addressed to its treasurer as an individual, and accepted by him with the addition of treasurer, etc., a sufficient ambiguity is thereby raised as to whether his acceptance was designed to be individual, or in his official capacity, to let in parol evidence to show the fact.[3]

Sec. 16. Rule when Ambiguity is raised by Extrinsic Proof.

Where an ambiguity, not apparent on the face of a written instrument, is raised by the introduction of oral evidence, the same description of evidence is admitted to explain it; for example, where a testator devises his estates of Blackacre, and has two estates called Blackacre, evidence may be admitted to show which of the Blackacres was meant; or if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which the testator intended.[4] And where the descrip-

[1] Mason *v.* Ryas, 26 Kan. 464; Knick *v.* Knick, *ante;* Hueske *v.* Broussard, *ante.*

[2] White's Bank *v.* Meyers, 73 N. Y. 335; 29 Am. Rep. 157; Heffield *v.* Meadows, L. R., 4 C. P. 595. See also S. P. Bridger *v.* Pierson, 45 N. Y. 601; Field *v.* Munson, 47 id. 223; Page *v.* McDonnell, 55 id. 299; Knapp *v.* Warner, 57 id. 668.

[3] Lafflin, &c., Powder Co. *v.* Sinsheimer, 48 Md. 411; 30 Am. Rep. 472; Bradlee *v.* Boston Glass Co., 16 Pick. (Mass.) 347; Haile v. Pierce, 32 Md. 330.

[4] *Per* GIBBS, C. J., Doe *v.* Chichester, 4 Dow. 93; Doe d. Morgan *v.* Morgan, 1 Cr. & M. 235; Goddard *v.* Bulaw, 1 Nott. & McC. (S. C.) 45; Breeding *v.* Taylor, 13 B. Mon. (Ky.)

tion of the devisee, or thing devised, is true in part, but not true in every particular, oral evidence is admissible to show the person or thing intended, provided there be enough on the face of the will to justify the application of the evidence.[1] Thus, an error in a Christian or surname may be proved.[2] Where the grantor has no lands agreeing exactly with the description in the deed, the lands intended may be shown by the contract of sale, or by letters written between the parties and their agents.[3]

Where a devise was to S. H., *second* son of T. H., but in fact S. H. was the third son, evidence of the state of the testator's family, and of other circumstances, was admitted to show whether he had mistaken the name or the description.[4] There are also other authorities for admitting evidence that the testator was accustomed to misname a person, and thus to show who was meant by him, although there be a person in existence whose name corresponds with that in the will.[5] So by "my nephew, J. G.," testator's wife's nephew may be shown to be meant, though the testator also had a nephew J. G. Where the devise was to John A., grandson of T. A., with a charge in favor of "each of the brothers and sisters" of the said John A., and it appeared that there were two grandsons of T. A., both named J. A.; held, that oral declarations of the testator were admissible to show which was meant, although it also appeared that only one of the grandsons had *several* brothers and sisters.[7] In the case of a devise to testator's niece, remainder to her three daughters, M., E., and A., the niece at the time of making the will had two legitimate daughters, M. and A.,

147; Milling *v.* Crankfield, 1 McCord (S. C.), 258; Clark *v.* Powers, 45 Ill. 283; Baker *v.* Talbot, 6 T. B. Mon. (Ky.) 182; Hembell *v.* White, 2 Overt. (Tenn.) ; Belt *v.* Miller, 4 H. & J. (Md.) 533; Dorsey *v.* Hammond, 1 H. & J. (Md.) 201.

[1] Miller *v.* Travers, 8 Bing. 248–9; Charter *v.* Charter, L. R., 2 P. & M. 315; L. R., 7 H. L. 364.

[2] Careless *v.* Careless, 1 Meriv. 384.

[3] Beaumont *v.* Field, 1 B. & A. 247.

[4] Le Chevalier *v.* Huthwaite, 3 B. & A. 632.

[5] Blundell *v.* Gladstone, 11 Sim. 467; 1 H. L. C. 778; Lee *v.* Pain, 4 Hare, 251.

[6] Grant *v.* Grant, L. R., 2 P. & M. 8; Id. *v.* Id., L. R., 5 C. P. 380; Id. 727; but see Wells *v.* Wells, L. R., 18 Eq. 504.

[7] Allen *v.* Allen, 12 Ad. & E. 451.

and one illegitimate, E.; held, that the claim of the latter might be rebutted by showing that the niece formerly had a legitimate daughter, E., and that the testator knew nothing of the death of the legitimate, or the birth of the illegitimate, E.[1]

Sec. 17. Declaration of Testator's Intention to explain Ambiguity admissible, when.

Evidence of the testator's declaration of *intention* is only admissible where the language is clear and unambiguous, but the ambiguity arises from some of the circumstances admitted in proof, as to which of two or more persons the testator intended to express.[2] Where a devise was to John H., the eldest son of John H., and it appeared that John H., the father, had an eldest son named Simon, and a son by a second marriage named John; held, that the declarations of the testator were not admissible to show which was meant.[3] Where the devise was to the testator's "nephews," and evidence had been adduced to show that he had no nephews, but that his wife's nephews were meant, it was held that evidence that these could not have been intended by the testator was not admissible, without also showing some other class who were intended to take.[4]

A devise to "my dear wife C." cannot be defeated by showing that the devisor had a lawful wife, M., alive when he went through a form of marriage with C.[5] But where B. makes a devise to his wife A., the devise may be defeated by showing that A. fraudulently concealed from B. that she had a husband living when she went through a form of marriage with B.[6] Where a fine was levied of 12 messuages in Chelsea, and it appeared that the cognizor had more than 12 messuages in Chelsea, oral evidence was admitted to show which messuages in particular the cognizor intended to pass.[7]

[1] Thomas *v.* Baynon, id. 431.

[2] Hiscocks *v.* Hiscocks, 5 M. & W. 363, 369; In the goods of Peel, L. R., 2 P. & M. 46; Charter *v.* Charter, L. R., 7 H. L. 364.

[3] Hiscocks *v.* Hiscocks, *supra.*

[4] Sherratt *v.* Mountford, L. R., 8 Ch. 928.

[5] Gains *v.* Rouse, 5 B. C. 422.

[6] Wilkinson *v.* Jonghin, L. R., 2 Eq. 319, following Kennell *v.* Abbott, 4 Ves. 802.

[7] Bulkeley *v.* Wilford, Ry. & M. 88.

Sec. 18. Where Evidence of Situation of the Property, etc., is admissible.

It may be laid down as a general rule, that all facts relating to the subject of the devise, such as that it was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will.[1] Even the value of the property, and the charges upon it in the will, may be shown in explanation of it.[2] In construing a will the court should place itself as fully as possible in the situation of the testator, and guide its construction of his intention in some degree by the light of the knowledge thus acquired.[3]

Where a subject-matter exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object. Thus, where a testator devised his "estate at Ashton," it was held that oral evidence was inadmissible to show that he was accustomed to call all his maternal estate "his Ashton estate," there being an estate in the parish of Ashton which was sufficient to satisfy the devise.[4] But a devise of lands "in parish D.," will pass lands of which *part* only is in D., if it be shown by oral evidence that all was reputed to be in it.[5] Where words have acquired a precise and technical meaning, no other meaning can be applied to them.[6] In the case of a legacy to the testator's "heir," it cannot be shown that a testator was in the habit of calling a person his heir who was not so.[7] If a will names the devisee and it is shown

[1] PARKE, J., in Templeman *v.* Martin, 4 B. & Ad. 785; Webber *v.* Stanley, 16 C. B., N. S. 698; Wigram on Interp. Wills.

[2] Nightingall *v.* Smith, 1 Exch. 879; see also Allgood *v.* Blake, L. R., 8 Ex. 160.

[3] Hill *v.* Crook, L. R., 6 H. L. 265, 277; Charter *v.* Charter, L. R., 7 H. L. 364, *per* LORDS CAIRNS, C., and SELBOURNE.

[4] Chichester *v.* Oxenden, 3 Taunt. 147; S. C. Dom. Pro., 4 Dow, 65; Webber *v.* Stanley, *supra;* Pedley *v.* Dodds, L. R., 2 Eq. 819. See also Carruthers *v.* Sheddon, 6 Taunt. 14.

[5] Anstee *v.* Nelms, 1 H. & N. 225; Whitfield *v.* Langdale, 1 Ch. D. 61.

[6] *Per* LORD KENYON, Lane *v.* Earl of Stanhope, 6 T. R. 352.

[7] Mounsey *v.* Blamire, 4 Russ. 384.

orally that there are several to whom the name applies; yet this is not enough to let in oral evidence of intention, where it can be collected from the will itself who was intended.[1]

Sec. 19. Rule where the Ambiguity is Patent.

Where the ambiguity is not latent, or raised by extrinsic evidence, but patent or apparent on the face of the instrument, oral evidence is not admissible to explain such ambiguity. Thus, where a blank is left for the devisee's name in a will, oral evidence cannot be admitted to show whose name was intended to be inserted.[2] Where the names of the devisees in a will of real property were all indicated only by single letters, a card kept by the testator separate from his will, containing "a key" to the letters, and showing the person meant by each, was held inadmissible to explain it, though referred to in the will.[3] But where a blank was left for the Christian name only, oral evidence was admitted to prove the individual intended.[4] So in case of a devise "to Mrs. G.," the Chancellor referred it to the Master to receive evidence to show the person intended, who found that the testator invariably called a Mrs. Gregg by the name of "Mrs. G."[5] Where a will mentioned George, the son of *George* Gord, and also George, the son of *John* Gord, a bequest to "George, the *son of Gord*," was explained by proof of the declarations of the testator to mean George, the son of *George* Gord.[6] In reply to the argument that this was a *patent* ambiguity, it was said that it could only appear ambiguous by showing *aliundē* the non-existence of a George, the son of Gord, different from the other two Georges; and that the mention of another George in the same will had no other effect than extrinsic proof of the same fact would have had. If an agreement, unambiguous on the face of it, is shown by extrinsic evidence to have a different

[1] Westlake *v.* Westlake, 4 B. & A. 57; Webber *v.* Corbett, L. R., 16 Eq. 515.

[2] Baylis *v.* Atty.-Gen., 2 Atk. 239. Webster *v.* Atkinson, 4 N. H. 21.

[3] Clayton *v.* Nugent, Ld., 13 M. & W. 200.

[4] Price *v.* Page, 4 Ves. 680. But see Doe d. Gord *v.* Needs, 2 M. & W. 139.

[5] Abbott *v.* Massie, 3 Ves. 148.

[6] Gord *v.* Needs, 2 M. & W. 129.

meaning from that which it imports, and the extrinsic facts are undisputed, the construction of it is for the judge, who ought not to leave it to the jury as a question of the intention of the parties.[1]

Where a blank is left in a written agreement which need not have been reduced into writing, and would have been equally binding if written or unwritten (as if the agreement be to deliver goods to the value of less than 10*l.*, and a blank be left for the quantity of goods to be delivered), in such a case it would seem that in an action for the non-performance of the contract, oral evidence may be admitted to supply the defect.[2] An instrument so imperfect on the face of it is no perfect contract at all so as to exclude oral evidence. As to the effect of omissions in a contract within the Statute of Frauds, see *post*, *Action for not accepting goods*. Where, in the entry of an appointment to a curacy in the bishop's register, a blank was left for a patron's name, it was held that this might be supplied by oral evidence.[3] A demise offered in evidence was a printed blank form filled up and altered for use; held, that the court might look at the parts struck out in order to ascertain the intent of the parties in what remained.[4]

Sec. 20. Rule where Ambiguity relates to the Application of the Writing to the Subject-matter.

Where the question is as to what the writing applies, oral evidence is admissible to explain it. Thus, where a testator devised "all his farm called Trogues Farm," it was held that it might be shown of what parcels the farm consisted.[5] But where a deed professes to convey a farm as described on a schedule and map annexed, a field not included in the map or schedule, though always treated as part of the farm, will not pass.[6] Where the testator devised two cottages, one described as being in the occupation of A., and the other

[1] Hitchin *v.* Groom, 5 C. B. 515.
[2] Phill. Ev. 521.
[3] Meath, Bp. of, *v.* Belfield, Ld., 1 Wils. 215.
[4] Strickland *v.* Maxwell, 2 Cr. & M. 539.
[5] Radford *v.* Southern, 1 M. & S. 299.
[6] Barton *v.* Dawes, 10 C. B. 261.

of B.; and it appeared that the testator had two cottages which had been internally divided, so that part only was occupied by A., and part of the other occupied by B.; it was held that only the portions of the cottages so occupied passed by the devise, and oral evidence was not admissible to show that he meant the entire cottages to pass.[1] Where a lease professed to demise premises and a yard, extrinsic evidence was admitted to rebut the presumption that a cellar under the yard was also intended to pass.[2] So in case of a written agreement to convey "all those brick-works in the possession of A. B.," oral evidence of what passed on making the agreement was admitted to show what brick-works were intended to pass.[3] Although the question of parcel or no parcel is for the jury, the judge must tell the jury what is the proper construction of any documents necessary to be considered in the decision of that question.[4] Conditions of sale, shown to a purchaser at the time of sale, are evidence against him of what was then reputed to be a part of the premises conveyed to him by the deed.[5] But they will not narrow the language of the conveyance.[6]

Sec. 21. General Rules as to Patent Ambiguities.

Under the rule that parol evidence is not admissible to add to or vary the terms of a written instrument, it follows as a matter of course that it is not admissible to explain a patent ambiguity,[7] or an ambiguity which appears upon the face of the instrument, and shows that something is omitted which must be added before the meaning of the parties can be ascertained. Thus, where a memorandum as follows: "B. takes C.'s Ohio and Miss. for 5,100 and odd dollars, to be ind. on C.'s note on date of sale," was relied on,

[1] Hubbard v. Hubbard, 15 Q. B. 227.

[2] Freeland *v.* Burt, 1 T. R. 701.

[3] Paddock *v.* Fradley, 1 C. & J. 90.

[4] Lyle *v.* Richards, L. R., 1 H. L. 222.

[5] Murly *v.* McDermott, 8 Ad. & E. 138.

[6] Norton *v.* Webster, 12 Ad. & E. 442. See also Glave *v.* Harding, 27 L. J., Ex. 286.

[7] Panton *v.* Tefft, 22 Ill. 366; Richmond Trading, &c., Co. *v.* Farquar, 8 Blackf. (Ind.) 89; Bowyer *v.* Martin, 6 Rand. (Va.) 525; Morris *v.* Edwards, 1 Ohio, 184; Johnson *v.* Bullen, 2 Port. (Ala.) 29; Betts *v.* Demumbrune, Cooke (Tenn.), 39; Mithoff *v.* Bryne, 20 La. An. 363.

it was held that parol evidence was not admissible to vary it, there being no dispute as to the specific note or stock meant, or the meaning of the abbreviations.[1] So, a contract in writing as follows: "I hereby agree to take 500 lbs. of sugar of B., and pay him therefor *ten* per pound," contains a patent ambiguity, and parol evidence is not admissible to show that ten *cents* was the price agreed on, consequently no action could be maintained upon the contract,[2] and generally, when the ambiguity arises from the phraseology of the contract, and not from extrinsic matters, the ambiguity is patent and cannot be cured by parol evidence.[3]

Sec. 22. Parol Evidence to Explain Writings.

Parol evidence is never admissible to explain a written contract or show the intention of the parties when the contract is free from doubt, and such evidence gives to the contract an effect different from that which arises from a fair construction of the language used, or gives an advantage to one party, or adds a burden to the other, which, except for such evidence, would not exist. Thus, where an agreement in writing was entered into between A. and B., that A. should have the product of "Boreham meadow," it was held that A. could not prove that it was at the same time agreed orally that he should also have the produce from both Milcroft and Boreham meadow.[4] So, where a note is payable on demand, parol testimony is not admissible to show that it was agreed that it should not be payable until a given event happened;[5] or to show that a note, payable on a day

[1] Colt *v.* Cone, 107 Mass. 285.

[2] In Clements *v.* Taylor, 65 Ala. 363, a certificate signed by the clerk of the U. S. district court officially, with the seal of the court affixed, which stated "that the foregoing pages, numbered from 1 to —, both inclusive, contain a full, true and complete transcript of all the proceedings in the matter of A. B., bankrupt, as the same appears of record, and on file in my office," not describing or identifying the papers included in the transcript, was held fatally defective, since, on account of the blank, the court could not tell what entries and papers were intended to be certified.

[3] Richmond, &c., Co. *v.* Farquar, 8 Blackf. (Ind.) 89.

[4] Alines *v.* Ansell, 3 Will. 275; Angel *v.* Duke, 32 L. T., N. S. 320; Hope *v.* Atkins, 1 Price, 143.

[5] Moseley *v.* Hunaford, 10 B. & C. 729; Besant *v.* Cross, 10 C. B. 895; Adams *v.* Woodley, 1 M. & W. 374.

certain, was to be paid on a contingency only;[1] or that one set of written instructions superseded another;[2] or that the party should have what the written instrument said he should not have,[3] as to include more property in a sale than that described in the written contract;[4] nor generally can a contract, which the parties intended to make, but did not make, be set up in place of one which they did make, but did not intend to make.[5]

Where the conditions of sale described the number and kind of timber trees to be sold by lot, but not the weight of the timber, it was held, in an action for the purchase-money, that oral evidence could not be given by the defendant that the auctioneer had, at the sale, warranted the timber of a certain weight.[6] So where a contract was entered into to deliver good, sound, merchantable logs, to be cut from standing timber within a mile from a certain creek, and there was evidence that the logs in question were cut within one-fourth of a mile from the creek, and that where the logs were cut, and a great many of the trees were rotten, it was held that the question was whether such logs were sound and merchantable, and, therefore, that evidence that they were not as good as other logs on the creek, or whether they were an average lot with other logs on the lot, was not admissible,[7] as the effect of such evidence would be to vary the terms of the contract from a contract to deliver good, sound, merchantable logs to one for the delivery of logs as good as other logs upon the lot, or logs on an average with other

[1] Ramsean *v.* Walker, 1 Stark. 361; Foster *v.* Jolley, 1 C., M. & R. 703; S. B. Morrison *v.* Lovejoy, 6 Minn. 319; Hatch *v.* Hyde, 14 Vt. 25; Swank *v.* Nichols, 24 Ind. 199; Farnham *v.* Ingham, 5 Vt. 514; Schurmier *v.* Johnson, 10 Minn. 319; Smith *v.* Thomas, 29 Mo. 307; Fay *v.* Blackstone, 31 Ill. 538; Carrier *v.* Hale, 8 Allen (Mass.), 47. Or to extend or vary the time of payment. Inge *v.* Hana, 29 Mo. 399; Brown *v.* Wiley, 20 How. (U. S.) 442; Eaton *v.* Emerson, 14 Me. 335; Joyner *v.* Turner, 19 Ark. 690; Cowles *v.* Townsend, 31 Ala. 133. And the same rule applies to bills of exchange. Mason *v.* Graff, 35 Penn. St. 445.

[2] Dunlap *v.* Monroe, 7 Cr. (U. S.) 242.

[3] Jones *v.* Parmer, 11 Paige (N. Y.) Ch. 650; Osborn *v.* Hendrickson, 7 Cal. 282.

[4] Osborn *v.* Hendrickson, *ante.*

[5] Sanford *v.* Howard, 29 Ala. 684.

[6] Rowell *v.* Edmunds, 12 East, 6; Shelton *v.* Livius, 2 C. & J. 411.

[7] Tenney *v.* Mulvaney, 8 Or. 513.

logs thereon, which is never admissible.[1] So oral evidence is inadmissible to alter the legal effect and construction of a written agreement. Thus, where an agreement for the sale of goods was silent as to the time of delivery, in which case the law implies a contract to deliver in a reasonable time, it was held that oral evidence of an agreement to take them away immediately was inadmissible.[2] So where a contract of sale, being silent as to time of payment, implies payment on delivery, proof of intended credit is inadmissible. Where the defendant, the day after a sale by him of flour to the plaintiff, sent a memorandum of the sale, "Sold White's X. S.," and delivered "White's X. S." accordingly: it was held, that the plaintiff could not show that the contract was for "White's X. X. S.[4] It is observable, however, that the four last cases were for non-performance of executory contracts within the Statute of Frauds, which ought to contain *all* the terms of agreement. So where the written agreement was to take goods on board a ship "forthwith," oral evidence to show that they were to be received on board *in two days* was not allowed.[5] An absolute sale of a reversion cannot be qualified by proof of an oral agreement to apportion the accruing rent.[6]

[1] Perrine *v.* Cheeseman, 11 N. J. L. 174; Huffman *v.* Hammer, 14 N. J. L. 269; Spencer *v.* Tilden, 5 Cow. (N. Y.) 144; Lowber *v.* Le Roy, 2 Sandf. (N. Y.) 202; Donaldson *v.* Benton, 4 Dev. & B. (N. C.) L. 435; Singleton *v.* Fore, 7 Mo. 515; Lane *v.* Price, 5 id. 101; O'Harra *v.* Hall, 4 Dall. 340; McDowall *v.* Beckley, 2 Mill (S. C.) Const. 365; Phillips *v.* Keener, 2 Overt. (Tenn.) 329; Bond *v.* Jackson, Cooke (Tenn.), 500; Linard *v.* Patterson, 3 Blackf. (Ind.) 353; Jones *v.* Webber, 1 N. Chip. (Vt.) 215; Bradley *v.* Bentley, 8 Vt. 243; Falkoner *v.* Garrison, 1 McCord (S. C.), 209; Barringer *v.* Sneed, 3 Stew. (Ala.) 201; Hair *v.* La Brouse, 10 Ala. 548; Rogers *v.* Atkinson, 1 Ga. 12; Wynn *v.* Cox, 5 Ga. 373; Madison, &c., Plank Road Co. *v.* Stevens, 6 Ind. 379; Irwin *v.* Ivers, 7 Ind. 308; Warren *v.* Crew, 22 Iowa, 315; Theurer *v.* Schmidt, 10 La. Ann. 125; Ferguson *v.* Glaze, 12 id. 667; Lesseps *v.* Wicks, id. 739; Young *v.* Frost, 5 Gill (Md.), 287; Albert *v.* Ziegler, 29 Pa. St. 50; Evans *v.* Evans, id. 277; Smith *v.* McCall, 1 McCord (S. C.), 220; Wade *v.* Odeneal, 3 Dev. (N. C.) L. 423.

[2] Greaves *v.* Ashlin, 3 Camp. 426; Halliley *v.* Nicholson, 1 Price, 404.

[3] Ford *v.* Yates, 2 M. & G. 549.

[4] Hamor *v.* Groves, 15 C. B. 667.

[5] Simpson *v.* Henderson, M. & M. 300.

[6] Flinn *v.* Calow, 1 M. & Gr. 589.

Sec. 23. Rule as to Independent Contracts where the Writing is evidently incomplete.

But in order to exclude oral proof of a contract, the writing must purport to be a *complete contract.* Therefore, where a written *order* for goods was sent without mentioning a time of payment, and they were delivered with an invoice accordingly, it was ruled in an action for goods sold, that an oral agreement for six months' credit might be proved; for the order *per se* was no contract, but only evidence of some of the terms of one.[1] The rule is that, *in all cases where a writing, although embodying an agreement, is manifestly incomplete and is not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes; but such parts of the actual contract as are not embraced within its scope, may be established by parol.*[2] But it must be remembered that this rule has no force where the contract comes within the Statute of Frauds,[3] as it is contrary to both the letter and spirit of that statute to permit a contract coming within its provision to rest partly in parol.[4] So where a written proposal was not accepted, oral evidence of the terms of the contract is admissible.[5] And it would seem that when a writing is not *ex necessitate legis* (as under the Statute of Frauds), the *appar-*

[1] Lockett *v.* Nicklin, 2 Exch. 93.

[2] Crane *v.* Elizabeth, &c., Assn., 29 N. J. L. 302; Parker *v.* Miller, 27 id. 338. The Alida, 1 Abb. Adm. (U. S.) 173; Sheffield *v.* Page, 1 Sprague, 285; Kieth *v.* Kerr, 17 Ind. 284; Taylor *v.* Galland, 3 Iowa, 17; Moss *v.* Green, 41 Mo. 389; Webster *v.* Hodgkins, 25 N. H. 128; Sale *v.* Darragh, 2 Hilt. (N. Y.) 184; Miller *v.* Fitchorn, 81 Penn. St. 252; Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539; Winn *v.* Chamberlin, 32 Vt. 318. Oral evidence, and a written memorandum not amounting to a contract, may be concurrently admitted to prove the terms of a contract. Mobile Marine Dock, &c., Co. *v.* McMillan, 31 Ala. 711. Where A. verbally accepts the written proposals of B., the contract is not reduced to writing, and parol evidence is admissible as to its terms. Pacific Works *v.* Newhall, 34 Conn. 67. So where there was a sale of a certain amount of standing timber by a contract partly reduced to writing, parol evidence was held admissible to show, what did not appear by the writing, *from what tract* the timber was to be cut. Pinney *v.* Thompson, 3 Iowa, 74.

[3] Choolam *v.* Kearn, 7 Ves. 211; Parterich *v.* Pawlet, 2 Atk. 283; Omerad *v.* Hardman, 5 Ves. 722.

[4] Wood on Statute of Frauds, 736.

[5] Scones *v.* Dowles, 29 L. J. Ex. 122; see also Eden *v.* Blake, 13 M. & W. 614.

ent deficiencies of a written agreement as to some particulars of price, time of delivery, etc., may be supplied by oral evidence, although the jury would be directed to presume a reasonable price, or reasonable time, etc., in the absence of such evidence; for such evidence does not *contradict* or *vary* the written document as far as it goes; and it may be that the parties themselves did not intend to commit to paper the *whole* of the contract.[1]

It is never admissible to show that at the time a written contract was made, an agreement by parol relating to the same subject-matter was also entered into, *but a parol agreement collateral to or independent of such written contract, may be shown*,[2] when it relates to a matter about which the writing is silent,[3] or to show a new and independent contract relating to the same subject-matter *subsequently entered into by parol upon a good consideration*, whether it is a substitute for the old contract, or is in addition to it,[4] and in such case, if the new contract covers the whole subject-matter of the written one, it supersedes and extinguishes it, and it is merged in the parol contract.[5] But if the new contract

[1] Valpy *v.* Gibson, 4 C. B. 837.

[2] Page *v.* Sheffield, 2 Curt. (U. S.) 377; Phillips *v.* Preston, 5 How (U. S.) 278; Shepherd *v.* Wyrony, 3 W. Va. 46; Heatherley *v.* Record, 12 Tex. 49; Flanders *v.* Fay, 40 Vt. 316; Marshall *v.* Baker, 19 Me. 402; Perry *v.* Central, &c., R. R. Co., 5 Cald. (Tenn.) 138; Cobb *v* O'Neal, 2 Sneed (Tenn.), 238; McKinstry *v.* Runk, 12 N. J. Eq. 60; Creamer *v.* Stephenson, 15 Md. 211; Joannes *v.* Mudge, 6 Allen (Mass.), 245. In Buzzell *v.* Willard, 44 Vt. 44, it was held that evidence of an oral agreement made collaterally with a deed, and relating to the property conveyed, but entirely independent of the instrument, is admissible. But such a parol agreement is not admissible to show that the grantee agreed to hold the land in trust for the grantor's benefit. Morrall *v.* Watterson, 7 Kan. 199; State *v.* Nashville, 2 Tenn. Ch. 755. Nor that it was verbally agreed that the manure on the lands should pass with the deed. Proctor *v.* Gibson, 49 N. H. 62. Nor to add a covenant to the deed. Sawyer *v.* Vories, 44 Ga. 662. Nor to attach a condition to the deed repugnant to its legal effect. Beers *v.* Beers, 22 Mich. 42. Or that a deed perfect on its face was delivered upon condition. Miller *v.* Fletcher, 27 Gratt. (Va.) 403.

[3] Keough *v.* McNitt, 6 Minn. 513; Ruggles *v.* Swarrick, 6 id. 457.

[4] Heatherly *v.* Record, 12 Tex. 49; Cummings *v.* Putnam, 19 N. H. 969; Van Buskirk *v.* Roberts, 31 N. Y. 661.

[5] Bernard *v.* Sampson, 12 N. Y. 561.

only relates to a part of the matters embraced in the written one, it only supersedes the latter as to the matters to which it relates, leaving the written contract in force as to all other matters.[1] So where a writing, although embodying an agreement, is manifestly incomplete, and not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes; but such parts of the actual contract as are not embraced within its scope, may be established by parol evidence.[2]

But this must be understood as applying only *when the writing was evidently not intended as the complete contract.* If the parties intended that the writing should embrace the entire contract, parol evidence is not admissible at law to add terms thereto, even though they were omitted by mistake.[3] In the latter case the writing itself is the sole exponent of the contract and cannot be varied by parol.[4] The rule stated may be said to apply only to informal instruments and loose memoranda which were manifestly not intended by the parties to contain the terms of their contract. Thus, where a plaintiff had bought and paid for a horse on a verbal warranty by the defendant, and shortly after the purchase was completed, the defendant gave him a paper in the following form:—"Bought of A. B., a horse for 7*l.*—A. B.,"—the court, in an action for breach of warranty, held that the plaintiff might prove the warranty by parol evidence, as the paper appeared to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, and

[1] Mowatt *v.* Lord Londersborough, 3 E. & B. 307; McCullough *v.* Girard, 4 Wash. (U. S. C. C.) 289; Atwood *v.* Norton, 27 Barb. (N. Y.) 638.

[2] McCullough *v.* Girard, 4 Wash. (U. S. C. C.) 292; Hunt *v.* Adams, 6 Mass. 519; The Alida, 1 Abb. Adm. (U. S.) 173; Sheffield *v.* Page, 1 Sprague (U. S. C. C.), 285; Kieth *v.* Kerr, 17 Ind. 284; Taylor *v.* Galland, 3 Greene (Iowa), 17; Moss *v.* Green, 41 Mo. 389; Webster *v.* Hodgkins, 25 N. H. 128; Sale *v.* Darragh, 2 Hilt. (N. Y.) 184; Miller *v.* Fichthorn, 31 Pa. St. 252; Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539; Winn *v.* Chamberlain, 32 Vt. 318.

[3] Young *v* Jacoway, 17 Miss. 212; Crane *v.* Elizabeth, &c., Assn., 29 N. J. L. 302.

[4] Perkins *v.* Young, 1 Gray (Mass.), 389; Kirk *v.* Hartman, 63 Penn. St. 97; Cooke *v.* Bailey, 42 Miss. 81.

not as containing the terms of the contract itself.[1] So, where a person, after having agreed to hire a horse, had given the owner a card, on which he had written in pencil, "six weeks at two guineas, W. H.," the owner was allowed to prove by parol evidence, not indeed a different time of hiring or a larger rate of payment than those stated in the memorandum, *but an additional term of the contract*, namely, that all accidents occasioned by the *shying* of the horse should be at the risk of the hirer.[2] Again, in the sale of a chattel under the value of 10*l.*, an auctioneer is not bound by the description of the article contained in the unsigned printed catalogue; but if, when the article was put up at auction, he publicly stated in the hearing of the purchaser that the description was incorrect, he will be entitled to a verdict for the price on giving parol proof of such statement.[3] But as previously stated, this rule, or rather exception to the general rule, is confined wholly to that class of writings which are mere memoranda, and were manifestly not intended to express the entire contract between the parties. In other words, *the writing on its face should rebut the presumption that it is complete*,[4] although it is not necessary that it should expressly and directly do so. Thus, where all the terms of a contract for the sale of a crop of cotton were reduced to writing, *except as to the time of delivery*, it was held competent to show, by parol, that at the time the contract was entered into, a day was fixed for delivery.[5] So, where a contract for the delivery of articles was silent as to the *place* of delivery, it was held that parol evidence was admissible to show that at the time the contract was executed, a particular place for delivery was agreed upon.[6] It will, from the last two instances given, be seen that contrary to the doctrine of some of the early cases,[7] that the presumption which the law

[1] Allen *v.* Pink, 4 M. & W. 140.

[2] Jeffrey *v.* Walton, 1 Stark. 267; Hadley *v.* Clinton, &c., Co., 13 Ohio St. 502.

[3] Eden *v.* Blake, 13 M. & W. 614.

[4] Jeffrey *v.* Walton, *ante*.

[5] Johnston *v.* McRary, 5 Jones (N. C.) L. 369.

[6] Mussleman *v.* Stoner, 31 Penn. St. 268.

[7] Barringer *v.* Sneed, 1 Stew. (Ala.) 201; Ely *v.* Adams, 19 John. (N. Y.) 312.

raises, either as to the time or place when or where a written contract is to be performed, may be overcome by parol proof of a contemporaneous agreement in that respect; but where a contract expressly provides that it shall be performed "within a reasonable time," parol evidence that a particular time was agreed upon within which it should be performed is not admissible. In such a case the jury must determine what is a reasonable time, and the contract is complete.[1] In the case of a blank indorsement of a bill or note, upon the principle already stated, the immediate parties to the instrument are not precluded from giving evidence of parol contemporaneous stipulations showing that a restricted operation was intended to be given to the signature, or that the transfer was upon trust, and not absolute;[2] for in such cases the contract is left incomplete by the parties. So, where a contract is silent as to the quantity of certain articles to be delivered, parol evidence is admissible to show it. Thus, where a receipt was given for money in this form: "Rec'd of H. S. Potter, five hundred dollars, as advance on my wheat, to be delivered before the 1st of July, at the Rochester price," it was held that parol evidence was admissible to show that the agreement was to deliver 600 or 700 bushels of wheat before the 1st of July at the plaintiff's warehouse, and was to have the Rochester market price at any time before that day, which he might elect.[3]

So in various cases of a somewhat similar nature, where a writing has been executed by way of part performance

[1] Jenkins *v.* Lykes, 19 Fla. 148.

[2] Stackpole *v.* Arnold, 11 Mass. 32; Susquehanna Bridge *v.* Evans, 4 Wash. (U. S. C. C.) 480; Bank of United States *v.* Dunn, 6 Pet. (U. S.) 51; Brock *v.* Thompson, 1 Bailey (S. C.), 322; Barry *v.* Morse, 3 N. H. 132; Fuller *v.* McDonald, 8 Me. 213; Wright *v.* Latham, 3 Murph. (N. C.) 208; Barrows *v.* Lane, 5 Vt. 161; Pike *v.* Street, 1 M. & M. 226; Hill *v.* Ely, 5 S. & R. (Penn.) 363; Dean *v.* Hall, 17 Wend. (N. Y.) 214; Perkins *v.* Catlin, 11 Conn. 213; Smith *v.* Barber, 1 Root (Conn.), 207; Barker *v.* Prentiss, 6 Mass. 430; Butler *v.* Suddeth, 6 Mon. (Ky.) 541; Daniel *v.* MacRae, 2 Hawks (N. C.), 590; Granby *v.* Harden, 7 Taunt. 163; Brent *v.* Metropolis Bank, 1 Pet. (U. S.) 89; Lansdale *v.* Brown, 3 Wash. (U. S. C. C.) 404.

[3] Potter *v.* Hopkins, 25 Wend. (N. Y.) 417; Norton *v.* Woodruff, 2 N. Y. 153; Young *v.* Bushnell, 8 Bos. (N. Y.) 1; Lent *v.* Hodgman, 15 Barb. (N. Y.) 274.

merely of a parol contract. A familiar illustration is where a chattel has been sold with warranty not in writing, and a note given for the purchase-money. Clearly the note, in such instances, would not merge the parol contract.[1] So a parol agreement between the parties was entered into, relating to the transfer of certain shares of stock in a bank not then completely organized. At the conclusion of the agreement, the defendant signed a paper, promising, in a general way, to transfer the shares as soon as books for that purpose should be opened by the bank. The defendant contended that this instrument should be treated as evincing the entire agreement, and that no parol evidence could be received of stipulations not contained in it. The court, however, deemed it a question of fact for the jury whether the instrument was given in full execution of the parol contract or in part merely; and WASHINGTON, J., who delivered the opinion, said—"if it should turn out that it formed part of the agreement that such a paper should be given, or that a paper of that description was, in the ordinary course of the defendant's business, in respect to transactions of this nature, given by him, evidence of the parol contract will be proper, and will not violate any of the rules of evidence."[2] In an action brought to recover a sum of money, for which the defendants had signed a writing whereby they acknowledged its receipt of the plaintiff "by the hands of B. to be accounted for," parol evidence on the part of the defendants to show that before the writing was signed, the plaintiff being indebted to L., and L. to the defendants, it was agreed that this money should be paid to the defendants in part payment of their claim against L., and in part satisfaction of L.'s claim against the plaintiff, was held admissible.

The court said the instrument was not a mere receipt, and therefore liable as such to be varied; nor was it one of those writings which are to be regarded as merging all previous negotiations; they viewed it as given merely in part execution of the parol contract, and therefore the latter might be

[1] Shepherd *v.* Temple, 3 N. H. 455; Reab *v.* McAllister, 8 Wend. (N. Y.) 116; McCulloch *v.* Girard, 4 Wash. (U. S. C. C.) 289.

[2] McCullough *v.* Girard, *ante.*

proved.[1] In another case, M. filed his bill in chancery, claiming a lien on lands sold to him by J. for an unpaid balance of the purchase-money. The bill charged that at the time of the purchase the number of acres in the tract sold was not ascertained; but it was agreed to estimate the quantity at 300 acres, with the understanding that a survey should subsequently be made, and if the tract should turn out to contain more land, the excess should be paid for at the same rate per acre as the three hundred acres, the supposed number; that with this understanding a bond of conveyance was executed by M. on the 17th of May, 1826, and a bond for the purchase-money, according to the estimate above mentioned, by J. on the day following; that a survey of the land was afterwards made, and it was found to contain a surplus of 230 acres over the estimated quantity; and for the price of the latter the complainant proceeded, he having previously assigned the bond for the other part of the purchase-money to one B. This bond was not produced, and the court declined deciding as to the existence of the lien until the contents of the bond should be proved in some way. But they said that, unless there was something in the structure of the bond which negatives the lien, it would have to be enforced. In respect to the parol proof relied on, they added—"On the supposition that the bond is a mere obligation for the payment of money, without reciting the contract of sale, there could be no possible legal objection to the admissibility of the evidence in relation to the excess of land above three hundred acres. It is in this light we have supposed it to exist. In that view, the introduction of the parol evidence would not affect in any manner the contract, as evinced by the bond of conveyance and bond for the purchase-money, but being evidence of a substantive independent contract, its admissibility could not be met by any legal objection."[2] On the same principle, where there is a writing importing a sale of personal property, or any other instrument of transfer, it will preclude the vendee from proving an agreement between him and the vendor, contempora-

[1] Gerrish *v.* Washburn, 9 Pick. (Mass.) 338.

[2] Hall *v.* Maccubin, 6 G. & J. (Md.) 107.

neous with the instrument, and consistent with its terms, that the value of the property should be applied to the payment of the defendant's debts.[1] The last case, like the one preceding it, goes on the proposition that parol evidence is admissible, in cases of written instruments, to prove collateral and independent facts, about which the writing is silent. In a case in Indiana, Kelsey and Dickson being partners in a mill which they had built, entered into a written agreement stating *inter alia* that Dickson had bought Kelsey's interest in the mill for 500 dollars, to be paid in certain installments. Kelsey, in an action against Dickson for the purchase-money, was permitted to show, by parol evidence, that the sum of 500 dollars which Dickson was to pay Kelsey for his interest in the mill was exclusive of the expense that had been incurred in building it, and that those expenses were to be paid by Dickson.[2]

A plain and well-established exception to the general doctrine which regards all anterior and contemporaneous stipulations and representations as merged in the written contract, exists, where one party sues the other, alleging as the gravamen of the action, some fraud of the latter, by which the former was induced to enter into the contract. It has been laid down in broad terms, that the rule which prefers written to unwritten evidence, does not so apply as to exclude the latter, when its object is to prove that the former had been fraudulently obtained, and thereby to avoid the contract evidenced by it, or secure indemnity to the party injured.[3] In an action on the case for deceit in the sale of a slave, though there was a written bill of sale, containing a warranty of soundness in "body, mind and title," yet it was held that parol evidence going to prove other representations made by the vendor at the time, such as that the slave was industrious and free from vice, whereas he knew the contrary to be the

[1] McCreary *v.* McCreary, 5 G. & J. (Md.) 147.

[2] Kelsey *v.* Dickson, 2 Blackf. (Ind.) 236; 3 id. 189.

[3] Cozzens *v.* Whitaker, 3 S. & P. (Ala.) 329; see Becker *v.* Vrooman, 13 John. (N. Y.) 301; Johnson *v.* Miln, 14 Wend. (N. Y.) 195; *per* MARSHALL, C. J., in Tayloe *v.* Riggs, 1 Pet. (U. S.) 591; *per* KENT, C. J., in Mumford *v.* M'Pherson, 1 John. (N. Y.) 44.

fact, was admissible.[1] So, where the bill of sale of a slave contained a warranty of soundness, but expressly excepted the "phthisic;" it was held that the vendee might nevertheless prove, in an action for deceit, that the vendor represented the slave as having the phthisic only slightly, whereas he knew her to be in the last stage of that disease.[2] But in Louisiana, in an action on a note given for the price of a slave, the defendant set up that the slave was in the habit of running away, and that the plaintiff knew this to be the case when he sold him. The bill of sale was under seal, and expressly stated the slave to be a "runaway and a drunkard." The defendant introduced evidence to show that the plaintiff falsely represented this as a qualified vice. The court, however, held him concluded by the deed.[3] Warranty is a contract, and being established by sufficient proof, it is not admissible to show that the representations were made in good faith.[4] A bill of sale in this form: *Mr. W. H., bought of B. S. and B.*, specifying the articles and their prices and the aggregate amount, delivered with the goods, constitutes a valid sale, which cannot be contradicted by parol evidence offered to show that the transaction was not a sale, but only a bailment.[5] When such a bill is delivered on the sale of a horse, adding to it the words "received payment," signed by the seller, it is adjudged a receipt, and not a contract or bill of sale which will exclude parol evidence of a warranty of the soundness of the horse,[6] nor as containing the terms of the contract itself.[7] The instrument, signed and delivered by the seller as a memorandum

[1] Cozzens *v.* Whitaker, 3 S. & P. (Ala.) 322; S. P. M'Farlane *v.* Moore, 1 Tenn. 174; see Johnson *v.* Brockelbank, 2 Hill (N. Y.), 353; Smith *v.* Williams, Murph. (N. C.) 426; Wren *v.* Wardlaw, 1 Ala. 363; Mumford *v.* M'Pherson, 1 John. (N. Y.) 418; Fleming *v.* Slocum, 18 John. (N. Y.) 403.

[2] Hanks *v.* M'Kee, 2 Litt. (Ky.) 227.

[3] Bayton *v.* Towles, 5 Mart. (La.) 1.

[4] Brisbane *v.* Parsons, 33 N. Y. 332.

[5] Bonesteel *v.* Flack, 41 Barb. (N. Y.) 435.

[6] Filkins *v.* Whyland, 24 N. Y. 338.

[7] Allen *v.* Pink, 4 M. & W. 140; Dunn *v.* Hewitt, 2 Den. (N. Y.) 637; Blood *v.* Harrington, 8 Pick. (Mass.) 552. In Hawson *v.* Henderson, 21 N. H. 224, parol evidence of the warranty was received, though there was a formal bill of sale.

of the sale, is evidence of a contract,[1]—an incomplete contract,[2]—not excluding proof of warranty by parol evidence. Parol evidence should not be received to vary the terms of a written agreement, and though received erroneously it is still the duty of the court and jury to give effect to the written in opposition to the verbal contract.[3] Where a person was induced to purchase land, by a fraudulent representation that a certain privilege was connected with the land, which the vendor knew was not included in the deed; it was held that the vendee might recover.[4] And in Louisiana, fraud in the sale, in such case, was allowed to be proved by way of defense to an action for the purchase-money.[5] So in South Carolina; and even representations founded simply in mistake, are there admissible as a defense, either to the whole action, or *pro tanto*, as the case may be.[6]

But where the writing is complete, all prior negotiations are merged therein. Thus in a Connecticut case,[7] the defendants made a written contract with the plaintiff to make and set for him "one drop flue boiler, 6½ feet in diameter, and 24 feet long, with all the iron work belonging to it—all the work to be done in the best manner and of the best material, and satisfactory." In a suit on the contract, in which the plaintiff claimed that the boiler was not properly made or set, he offered to show that, during the negotiations which resulted in the making of the contract, he informed the defendants how much machinery the old boilers then in his mill would operate, and that he wanted a new boiler of the same efficiency, and that the defendants assured him that the boiler which they would make should be as efficient as the old ones, and consume at least one-third less fuel, and that, on the faith of this assurance, he entered into the agreement; with further evidence that the boiler consumed more fuel and was less

[1] Long *v.* Wheeler, 25 N. Y. 520.

[2] Koop *v.* Handy, 41 Barb. (N. Y.) 454.

[3] Durgin *v.* Ireland and Pruden, 14 N. Y. 322.

[4] Monell *v.* Colden, 13 John. (N. Y.) 395; see also Russell *v.* Rogers, 15 Wend. (N. Y.) 351; Johnson *v.* Miln, 14 id. 199.

[5] Broussard *v.* Sudrigue, 4 Mill. (La.) 347.

[6] Means *v.* Brickell, 2 Hill (S. C.), 657.

[7] Fitch *v.* Woodruff Iron Works, 29 Conn. 82.

efficient than the old ones. It was held that the negotiations were merged in the written agreement, and that the evidence was inadmissible.

So where the owner of land entered into a contract under seal with a railroad company to convey to the company a right of way over his land, in consideration of $1, and of their building their road, etc., it was held that evidence was not admissible in an action to enforce the contract to prove a verbal agreement on the part of the company to fill up a sluice upon the land, as part consideration of the conveyance.[1] In a New Hampshire case,[2] the defendant contracted in writing to take all the white oak timber upon the plaintiff's land that was "suitable for ship timber." It was held that evidence of declarations made at the time when the contract was entered into, that the vessel for which he designed the timber, was a small-sized one, and that he wanted the *small* timber upon the lot to put into the top of the vessel, for the purpose of showing what sized timber he wanted, were inadmissible. In another New Hampshire case,[3] A. entered into a written agreement with B. to haul all the logs upon a certain lot to another place, before a certain period. In an action upon such agreement it was held that A. could not introduce evidence to show that B. said, at the time of making the contract, that, if there should not be snow enough, he must leave them on the ground. In a New York case[4] the plaintiff, by a written agreement, bound himself to labor on a railroad at five shillings a day, and at the same time, by parol, was promised twelve shillings per day if employed on rock work. It was held that the written agreement being general in its terms could not be controlled by evidence of the parol promise, and in the absence of any deceit as to the contents of the written agreement, the plaintiff, though an ignorant man, could recover on that only. So, where there was a written agreement to deliver "25,000 pale brick for three dollars per M, and 50,000 hard brick for four dollars per M cash," parol evidence was held inadmissible

[1] Purinton *v.* Northern Ill. R. R. Co., 46 Ill. 297.

[2] Pillsbury *v.* Locke, 33 N. H. 96.

[3] Hadyden *v.* Waldron, 9 N. H. 66.

[4] Mallon *v.* Story, 2 E. D. S. (N. Y. C. P.) 331.

to show that the parties intended the delivery to be in parcels, payment for each parcel to be due as it was delivered.[1] So, where a written contract made the inspection and determination of one S. as to the quality or grade of certain hops, conclusive upon the parties, evidence offered to show that they were of inferior quality and worthless, was held inadmissible.[2] So, where there was writing, either in the body of a written agreement or in the form of a party's signature, indicating that the obligation thereby created was intended to be any other than a personal obligation on his part, it was held that parol evidence was inadmissible to show that the agreement was in fact the obligation of third persons, and that such party signed the agreement as their agent.[3] Where there was a written agreement to ship hogs to New York, evidence of a verbal agreement that they should be shipped by a certain one of two usual routes was rejected.[4] A contract for masonry was perfectly clear in its specifications as to quality, etc. The work never having been accepted, the contractor suing for damages, attempted to show by parol that the understanding and agreement of the parties was that the work should be done, not according to the specifications, but like other work previously done by the same contractor for other parties; that the specification in the contract was a printed form made for all contracts entered into by the commissioners of works, and not prepared with reference to this particular contract. The evidence was excluded.[5] In an action by a contractor for carrying the mails against a sub-contractor for default in performing the sub-contract, parol evidence was held to be inadmissible to show that the plaintiff agreed to obtain the consent of the post-office department to a transfer of the contract to the defendant.[6] Where the plaintiff, in an action on a contract for constructing a canal, offered to prove that the defendants, either at the time when the contract was exe-

[1] Baker *v* Higgins, 21 N. Y. 397.
[2] Clinton *v.* Brown, 41 Barb. (N. Y.) 226.
[3] Babbett *v.* Young, 51 Barb. (N. Y.) 466.
[4] Webster *v.* Paul, 10 Ohio St. 531.
[5] Walker *v.* Manning, 6 Iowa, 519.
[6] Pierce *v.* Walker, 23 Iowa, 424.

cuted, or in the preliminary negotiations concerning it, verbally promised him to construct a slope wall against the embankment as the work advanced, which would have prevented it from being swept away by the floods, it was held that such evidence was inadmissible to control or vary the contract in writing, in not coming within the rule allowing the introduction of evidence as to the actual state of things at the time when a contract in writing is made, to aid in its construction.[1] It is hardly necessary to say that parol evidence is never admissible to show a contemporaneous agreement inconsistent with that which is written; as, that when a contract for the payment of money was executed, it was agreed that property instead of money should be accepted;[2] or that when a contract was entered into by A., to pay B.'s debts, it was agreed by parol that a debt due from B. to C. was not included;[3] or, that under a contract by A. to ship to B. a certain quantity of goods, it was agreed that he should only ship what he then had on hand,[4] because in all these instances the effect of the evidence is to vary the written contract. The illustrations given will furnish a fair test by which to determine when parol evidence is or is not admissible to set up an independent parol agreement.

Sec. 24. Receipts

An exception is also allowed, where the writing is one of that character which the law does not regard as the best evidence of the transaction to which it relates. Such are general receipts, and other instruments of the like nature.[5]

[1] Boyle *v.* Agawam Canal Co., 22 Pick. (Mass.) 381.

[2] Roundtree *v.* Gilroy, 57 Tex. 176; Van Vechten *v.* Smith, 59 Iowa, 173. Nor in an action on a note can it be shown that a mistake was made in arriving at the amount for which it was given. Clute *v.* Frasier, 58 Iowa, 268.

[3] Brenner *v.* Luth, 28 Kan. 581.

[4] Schreiber *v.* Butler, 84 Ind. 576.

[5] Baugh *v.* Brassfield, 5 J. J. Mar. (Ky.) 97; Hitt *v.* Slocum, 37 Vt. 524; Nye *v.* Kellum, 18 id. 594; Street *v.* Hall, 29 id. 165; Jones *v.* Patterson, 1 W. & S. (Penn.) 321; Badger *v.* Jones, 12 Ark. 371; Oakley *v.* State, 40 Ala. 392; Calhoun *v.* Richardson, 30 Conn. 216; Hawley *v.* Badger, 15 Cal. 44; Porter *v.* Chicago, &c., R. R. Co., 20 Iowa, 73; Dunnagan *v.* Dunnagan, 38 Ga. 554; Illinois, &c., R. R. Co. *v.* Cowles, 32 Ill. 116; Baugh *v.* Brassfield, 5 J. J. Mar. (Ky.) 79; Carr *v.* Minor, 42 Ill. 179; Bringler *v.* Gor-

Though when these assume the form of a contract, they are to be treated so far as the exclusive medium of proving what the parties agreed to. Bills of parcels fall within the range of the exception.[1] So where it appeared that A. sold B. a quantity of hops, and gave a bill of parcels, stating the number of bags, weight, price, etc., with a clause added as follows: "These hops are warranted to be of the best quality," in an action against A. for a breach of the warranty it was held that A. was not precluded by the bill of parcels from proving that the hops were warranted only in case they were carried to a particular place.[2]

The inconclusiveness of receipts, as such, has been recognized and acted upon in numerous cases.[3] But if a receipt in full is given with a knowledge of all the circumstances, and there is no mistake or surprise on one side, or fraud or imposition on the other, it will be effectual to defeat a further claim.[4] A receipt of a certain sum in full of all demands, though not conclusive, is *prima facie* evidence of a settlement between the parties, and a payment of the balance, and it is erroneous to say that it is only evidence of the payment of the sum specified.[5] A receipt "in full of

don, 14 La. An. 274; Richardson *v.* Reed, 43 Me. 161; Dunham *v.* Bauer, 9 Allen (Mass.), 352; Rowe *v.* Wright, 12 Mich. 289; Ben *v.* Wiley, 17 Mich. 508; Williams *v.* State, 20 Miss. 58; Wallace *v.* Wilson, 30 Mo. 335; Edgerley *v.* Emerson, 23 N. H. 555; Furbush *v.* Goodwin, 25 id. 425; Bird *v.* Davis, 14 N. J. Eq. 467; Wadsworth *v.* Alcott, 6 N. Y. 64; Buswell *v.* Ponier, 37 id. 312; Dutton *v.* Tilden, 13 Penn. St. 46. And this is held to be the rule in some of the States where the receipt is under seal. Jones *v.* Ward, 10 Yerg. (Tenn.) 160. But in those States where the distinction between simple contracts and specialties is preserved, the rule would be otherwise. State *v.* Messick, 1 Houst. (Del.) 346.

[1] Harris *v.* Johnson, 3 Cranch (U. S.), 311.

[2] Wallace *v.* Brown, 2 N. H. 596.

[3] Goddard *v.* Cutts, 11 Me. 440; Chunn *v.* M'Carson, 2 Dev. Eq. (N. C.) 73, 74; Beers *v.* Broome, 4 Conn. 467; Lingan *v.* Henderson, 1 Bland's Ch. (Md.) 249; Graves *v.* Key, 3 B. & Ad. 318; Fairmaner *v.* Budd, 7 Bing. 574. In Fuller *v.* Crittenden, 9 Conn. 401, several of the cases on this subject were reviewed and the result declared to be, that such circumstances as would lead a court of equity to set aside a contract (*e. g.* fraud, mistake or surprise) may be shown at law, to destroy the effect of a receipt.

[4] Emric *v.* Gilbert, 1 Wright (Ohio), 764; Holbrooke *v.* Blodget, 5 Vt. 520; Sessions *v.* Gilbert, Brayt. (Vt.) 75; Carter *v.* Bellamy, Kirby (Conn.), 291; Giddings *v.* Munson, 4 Vt. 308.

[5] Reid *v.* Reid, 2 Dev. (N. C.) 247.

rent for factory up to" a particular day is *prima facie* evidence not merely that the last quarter's rent ending on the day specified was paid, but that all previous rent was paid.[1] Where a receipt was indorsed by the agent of the plaintiff in execution for a certain sum "in full of the within execution," it was held that evidence might be admitted to show an error, and that the receipt was only to be in full of all the money then made on the execution.[2]

But where a receipt is in the nature of a contract, it is, so far, within the general rule, and not liable to be varied by parol evidence.[3] The receipt may be explained by parol evidence of usage.[4] A bill of lading, for example, has a two-fold aspect, viz., a receipt and a contract to carry and deliver.[5] A carrier may show that the articles receipted in the bill of lading were not in good order.[6] But the contract embraced in the bill of lading cannot be contradicted or modified by parol evidence,[7] as by proof of custom.[8] You cannot vary or contradict the bill of lading as to the course designated in it which the vessel is to take. So *a clean bill of lading*, which imports that the goods are stowed *under deck*, cannot be varied by a contemporaneous parol contract that they were to be stowed *on deck*.[9]

A receipt of property levied on by a sheriff, containing the usual promise to redeliver for the purpose of satisfying the execution, was held within the general principle applicable to contracts, and not liable to be varied by parol evidence ;[10] and an agreement of the officer and the creditor, contemporaneous with the receipt, that they would relieve the receiptor

[1] Patterson *v.* Ackerson, Edw. Ch. (N. Y.) 427.

[2] Singleton *v.* Smith, 4 Mill. (La.) 430.

[3] Querry *v.* White, 1 Bibb (Ky.), 271 ; Smith *v.* Brown, 3 Hawks (N. C.), 580; Raymond *v.* Roberts, 2 Aik. (Vt.) 204; Stone *v.* Vance, 6 Hamm. (Ohio) 246. But see Potter *v.* Hopkins, 25 Wend. (N. Y.) 417.

[4] Goodyear *v.* Ogden, 4 Hill (N. Y.), 104; Dawson *v.* Kittle, id. 107.

[5] Wood *v.* Perry, 1 Wright (Ohio), 240.

[6] Ellis *v.* Willard, 10 N. Y. 529.

[7] Fitzhugh *v.* Wiman, 10 N. Y. 559.

[8] Simmons *v.* Law, 8 Bosw. (N. Y.) 213.

[9] Cherry *v.* Holly, 14 Wend. (N. Y.) 26; Barber *v.* Brace, 3 Conn. 9.

[10] Wakefield *v.* Stedman, 12 Pick. (Mass.) 562; Bursley *v.* Hamilton, 15 id. 40.

by taking back the property, is merged in the writing.[1] But a recital or statement of the value of the property in such or the like receipts will not generally conclude the party giving them, even as in favor of the other party; otherwise, however, where the party giving the receipt has willfully refused to return the property, or has destroyed it, etc.[2] Where a receipt was collateral to the instrument declared on, and used by a stranger against a party, it was held that the latter might contradict or vary it by parol.[3]

Indeed, in regard to mere written admissions of various kinds, they are seldom, if ever, conclusive against the party making them save as in favor of some one who has been drawn in to act upon the assumption of their being what they import on their face. But, even as in favor of those who have been drawn in to act, such admissions will not conclude, except for their own proper object, and while the writing evincing them continues in force. Hence, though a receiptor of property levied on by an officer will generally be precluded from showing title in himself, as against the officer, yet, where A. gave such a receipt, in which he admitted the property to belong to S., the defendant in the execution, and the property was afterwards redelivered to the sheriff pursuant to the terms of the writing, it was held that the receiptor was not estopped by anything in the writing, or his acts, from bringing replevin on the ground of the property being his. The writing would be a strong fact against his title, but not conclusive.[4] The court liken the case to a man's taking a lease, for a year, of his own lands. During the year he shall not question the title of his landlord, but after that he may. It clearly appeared, however, in this case, that the sheriff had notice of the defendant's claim, both when the receipt was given and when the property was delivered in pursuance of the receipt. Had there been no notice of the kind before suit brought, it may be questionable whether the action could have been maintained.

[1] Curtis *v.* Wakefield, 15 Pick. (Mass.) 437.

[2] Bancroft *v.* Parker, 13 Pick. (Mass.) 192.

[3] Badger *v.* Jones, 12 Pick. (Mass.) 371.

[4] Johns *v.* Church, 12 Pick. (Mass.) 557.

It seems that, in cases like that, even if the property has not been delivered, and an action is brought on the receipt, the defendant may show his title, and that the sheriff had notice of it at the time of taking the receipt, in mitigation of damages, but not otherwise.[1]

A receipt for the purchase-money of a slave, containing a warranty of soundness, and accompanied by an order on a third person for the delivery of the slave, was held to exclude parol evidence for the purpose of showing the intention of the parties to be, that the title to the slave was not to vest in the purchaser till the slave was *actually* delivered.[2]

A creditor, on a compromise with his debtor, took the note of A. for an amount less than his debt, by way of payment, and indorsed on a note he held against the debtor an acknowledgment of the receipt of A.'s note as a compromise for the full payment of the debtor's note. It was held that, in an action subsequently brought by the creditor against the debtor, the former could not give parol evidence that, in addition to A.'s note, a further sum was agreed to be paid him by the debtor.[3]

Where a receipt was of a sum *for safe keeping*, it was held that it could not be contradicted by evidence that the money was *paid*.[4] Nor can the *legal effect* of special receipts in the nature of a contract be varied by parol.[5]

A technical release from all demands, etc., will estop the party, and its operation cannot be varied by showing that a particular demand was not intended to be included.[6]

Sec. 25. Rule as to Admission of Parol Evidence relating to Surrounding Circumstances.

The rule that *parol evidence is admissible to explain and apply a writing, where it does not contradict or vary it*, is universal in its application, and is in accordance with another rule which is well recognized, that *a writing may be read in*

[1] Bursley *v.* Hamilton, 15 Pick. (Mass.) 40.

[2] Franklin *v.* Long, 7 G. & J. (Md.) 407.

[3] Kellogg *v.* Richards, 14 Wend. (N. Y.) 116.

[4] Tisloe *v.* Graefer, 1 Blackf. (Ind.) 353.

[5] Stone *v.* Vance, 6 Hamm. (Ohio) 246.

[6] Pierson *v.* Hooker, 3 John. (N. Y.) 68.

the light of surrounding circumstances in order that the true intent and meaning of the parties may be arrived at,[1] and that independent and collateral facts, about which the contract is silent, may be shown by parol.[2]

The surrounding circumstances, and subsequent conduct and acts of the parties, are material and competent to show the interpretation which they put on an agreement, and what conditions they have waived.[3]

It is allowable also, in many instances, to show in evidence pre-existing and contemporaneous facts and circum-

[1] In Robinson *v.* Barnett, 18 Fla. 602, at the maturity of a note the holder demanded payment of the apparent indorser, but he refused, alleging that the indorsement was forged, but to save the expense of protest, he wrote over the indorsement the words "protest waived," and in an action against him evidence of these facts was held admissible. Emery *v.* Webster, 42 Me. 204; Knight *v.* N. E. Worsted Company, 2 Cush. (Mass.) 271; Barnabee *v.* Suaer, 18 La. An. 148; Pierson *v.* Atlantic Bank, 77 N. Y. 304; Spencer *v.* Babcock, 22 Barb. (N. Y.) 326; Reader *v.* Helms, 57 Ala. 440.

[2] Keogh *v.* McNitt, 6 Minn. 513.

[3] Acker *v.* Bender, 33 Ala. 230; S. P. Cross *v.* Pearson, 17 Ind. 612; Emery *v.* Webster, 42 Me. 204; Grant *v.* Lathrop, 23 N. H. 67; Halsted *v.* Meeker, 15 N. J. L. 136; Haldeman *v.* Chambers, 19 Tex. 1; Conner *v.* Carpenter, 28 Vt. 237; Ratcliffe *v.* Allison, 3 Rand. (Va.) 537; Sigerson *v.* Cushing, 14 Wis. 527; Carmony *v.* Hoober, 5 Penn. St. 305. Evidence in explanation of an authentic act is admissible where it does not contradict, vary, alter, enlarge, or restrict the act. Barnabee *v.* Suaer, 18 La. Ann. 148. And, though not admissible to add to or vary the terms of a written contract, it is admissible to prove facts and circumstances as to the relations of the parties, and the nature, quality, and condition of the property, which is the subject of the contract; and also the acts of the parties at and subsequent thereto, for the purpose of showing their understanding of its terms. Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271. Thus, where upon a partition between co-heirs, a way is assigned to one, and upon the evidence it is uncertain which of two routes was intended, evidence is admissable of any circumstances or acts of the parties or of the commissioners indicating such intention. French *v.* Hayes, 43 N. H. 30. Such extrinsic facts, existing at the time a written contract is made, are admissible to aid in the interpretation of the instrument, although not to contradict it Phelps *v.* Bostwick, 22 Barb. (N. Y.) 314; Spencer *v.* Babcock, id. 326. And in construing a written instrument, the situation of the parties and the nature and object of their transactions may be looked at; *but the court cannot give effect to any intention which is not expressed by the language of the instrument when looked at in the light of facts that are properly before the court.* Farmers', &c., Co. *v.* Commercial Bank, 15 Wis. 424.

stances attending the negotiations of the parties in making the contract, as such facts often throw light upon the disputed contract itself.[1] Mr. Wigram[2] says, "Every claimant under a will has a right to require that a court of construction in the execution of its office shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare;" and this rule applies with equal force to all classes of instruments, as all writings are presumed tacitly to refer to the circumstances existing when they were made,[3] and it is upon this principle that evidence of customs and usages is admitted in aid of the interpretation of instruments, as "the law is not so unreasonable as to deny to the *reader* of any instrument the same light which the *writer* enjoyed," bearing in mind, however, that a writing cannot be added to or cut down by the testimony of witnesses.

Sec. 26. Parol Evidence to prove Collateral Matters.

Parol evidence may be said to be primary where the writing is not admissible to prove the facts to establish which the oral proof is offered,[4] or where it is offered to establish a matter collateral to or distinct from the writing,[5] as, the consideration, or failure of the consideration, of a guaranty,[6] note,[7] or other contract[8] or obligation,[9] where the considera-

[1] Pierson *v.* Atlantic Bank, 77 N. Y. 304; Barnebe *v.* Suaer, 18 La. An. 148; Reader *v.* Helms, 57 Ala. 440. In Coml. Bank of Albany *v.* Clark, 28 Vt. 325, the defendant was sued as indorser of a bill of exchange. The notice of its dishonor was proved by his written acknowledgment that he did receive due and legal notice of the protest and non-payment of the bill. The question in the case was, whether this written acknowledgment was conclusive, or whether he could show that in fact no such notice of protest was ever given, *he having signed the admission under a misapprehension of the facts.* The court held that there was nothing in the case to render the testimony inadmissible. See also Sigerson *v.* Cushing, 14 Wis. 527; Lyon *v.* Kidder, 48 Vt. 42.

[2] Wigram on Extr. Ev. 59, 138.

[3] Wigram on Extr. Ev. 57.

[4] Sparks *v.* Rawls, 17 Ala. 211.

[5] Shiel *v.* Starke, 14 Ga. 429.

[6] Nichols *v.* Bell, 1 Jones (N. C.) L. 32.

[7] Long *v.* Davis, 18 Ala. 801; Beckels *v.* Cunningham, 14 Miss. 358; Smith *v.* Crooks, 18 Ga. 440; Herrick *v.* Bean, 20 Me. 51.

[8] Cowan *v.* Cooper, 41 Ala. 187.

[9] Andrews *v.* Andrews, 12 Ind. 348; Groesbeck *v.* Seeley, 13 Mich. 329; Estabrook *v.* Smith, 6 Gray (Mass.). 572; Harwood *v.* Harwood, 22 Vt. 507.

tion is not specifically stated in the instrument.[1] Such evidence is admissible to identify the subject-matter of the contract or deed or other instrument, and apply it thereto,[2] where the instrument itself does not sufficiently show to which of two or more things it applies. So, too, it is admissible to prove matters collateral to the agreement which are not repugnant therewith. Thus, while it is a well settled rule that parol evidence cannot be admitted to contradict or vary the terms of a written instrument, and that a conveyance cannot be shown by parol to be to another use or intent than that expressed in it, yet parol evidence may be admitted *to prove a collateral agreement connected with stipulations in a deed, and in no respect repugnant to it.* As where A., B. and C. were partners, and A., without consulting his copartners, acting as the agent of D., his brother, fraudulently applied some of the funds of the partnership to the use of D., and D., by his deed, reciting that A. was largely indebted to B. and C., which indebtedness he had agreed to discharge, etc.,—it was held, that the amount of this indebtedness, which was not stated, might be shown by parol evidence.[3]

So, too, where an agreement is entered into between two or more sureties or indorsers on a note that they will divide the loss between them, in an action by the one who has paid the note against the other upon such agreement, parol evidence is admissible to prove it.[4] In Indiana[5] it has been held that the grantor of land, who has sold it by warranty deed, may, although the grantee entered into possession at once, and although the deed contained no mention thereof, show a parol reservation of a growing crop;[6] and in Penn-

[1] Wood *v.* Beach, 7 Vt. 522; Merle *v.* Matthews, 26 Cal. 455; White *v.* Weeks, 1 Penn. 486; Myer *v.* Casey, 57 Miss 615; Cornell *v.* Markham, 19 Hun (N. Y.), 275; De Lavalette *v.* Wendt, 75 N. Y. 579.

[2] Norris *v.* Shafford, 127 Mass. 85; Chicago Dock, &c., Co. *v.* Kinzie, 93 Ill. 415; Hannah *v.* Shirley, 7 Oregon, 115; Ames *v.* St. Paul, &c., R. R. Co., 12 Minn. 412; Barnhardt *v.* Riddle, 23 Penn. St. 93; Hildebrand *v.* Tagle, 20 Ohio, 147; Gould *v.* Lee, 55 Penn. St. 99; Robinson *v.* White, 42 Me. 209; McGregor *v.* Brown, 5 Pick. (Mass.) 170; Hardy *v.* Matthews, 38 Mo. 121.

[3] Pomery *v.* Manin, 2 Paine (U. S.), 476.

[4] Phillips *v.* Preston, 5 How. (U. S.) 278.

[5] Harvey *v.* Millier, 67 Ind. 90.

[6] Overruling Chapman *v.* Long, 10 Ind. 465.

sylvania[1] it has been held that parol evidence is admissible to show that a heater and gas fixture were to pass to the purchaser of a house, under a written agreement in which no mention was made of such articles.

So, too, it has been held that, *as between an indorser and his immediate indorsee*, oral evidence is competent to show a waiver of demand and notice of non-payment at the time of indorsing in blank.[2] But such evidence is not admissible as against third persons into whose hands the note may pass in due course of business, because *they* have a right to rely upon the obligation which the law implies from a blank indorsement, and are not bound by any private contract or arrangement made between other parties to the note, which does not appear thereon.[3] This doctrine is not, apparently, in accordance with the general drift of the authorities,[4] but it seems to us that neither its justice or soundness can be questioned, as the only effect of the evidence is to show a waiver by one party of a legal right, and not an addition to, or alteration of, the contract itself; and that a waiver of a right may be proved by parol, whether arising under a contract, deed, or by operation of law, has been repeatedly held by our courts.[5] But, of course, such a waiver is only effectual, so far as a *negotiable* instrument is concerned, between the immediate parties to the agreement. Nor is evidence of any collateral agreement admissible even between the parties, which in any manner varies or changes the terms of the contract. Thus, evidence is not admissible to show that the payee of a note, at the time of transferring it, by indorse-

[1] Heysham *v.* Dettre, 89 Penn. St. 506.

[2] Dye *v.* Scott, 35 Ohio St. 194; 35 Am. Rep. 604. See § , *Bills and Notes, post.* See also Davis *v.* Morgan, 64 N. C. 540; Mendenhall *v.* Davis, 72 id. 150, in which it was held that parol evidence is admissible to annex qualifications, or a special contract even, as between the immediate parties under a blank indorsement.

[3] Dye *v.* Scott, *ante.*

[4] Bartlett *v.* Lee, 33 Ga. 491; Bank of U. S. *v.* Dunn, 6 Pet. (U. S.) 51; Dale *v.* Gear, 38 Conn. 15.

[5] Ruffinsberger *v.* Callison, 28 Penn. St. 426; Willey *v.* Hall, 8 Iowa, 62; Wood *v.* Perry, 1 Barb. (N. Y.) 114; Bryan *v.* Hunt, 4 Sneed (Tenn.), 543; Chiles *v.* Jones, 8 B. Mon. (Ky.) 51; Parker *v.* Syracuse, 31 N. Y. 376; Leathe *v.* Bullard, 8 Gray (Mass.), 545; Medomok Bank *v.* Curtis, 24 Me. 36.

ment, orally agreed to assume the payment of it absolutely and unconditionally,[1] nor that it was agreed between them that the indorsers should not be liable.[2] And generally it may be said that *parol proof of any collateral parol agreement may be given, which does not interfere with the terms of the written contract, although it may relate to the same subject-matter.*[3] Where the parol agreement is merely collateral to the principal agreement, and independent of it, it may be made the ground of an action for recoupment or abatement of damages, and may be established by parol. Thus, in a Massachusetts case,[4] at the time of the negotiation for the purchase of land, a sewer was in process of construction in the street on which the land abutted. The purchaser called the owner's attention to it, and asked him who was to pay for the sewer, to which the owner replied that he would, and that the other party should not be called upon to pay a cent for it. A deed of the land was subsequently given, with the usual covenants of warranty, but no mention was made of the sewer. The purchaser afterwards paid an assessment for the construction of the sewer, and in an action by him against his grantor to recover the amount paid, it was held that evidence of the conversation and existing circumstances was sufficient to prove the promise, and that it was not open to the objection that it varied or enlarged the written instrument.[5]

Sec. 27. To show Fraud, Illegality, Duress, Etc.

The rule excluding this class of proof to explain, vary or control a written contract does not apply, even in a court of law, where it is claimed that a material part of it has been inserted by the fraud of one of the parties,[6] or that a material

[1] Rodney *v.* Wilson, 67 Mo. 123; 29 Am. Rep. 499; Doolittle *v.* Ferry, 20 Kan. 230; 27 Am. Rep. 166.

[2] Hill *v.* Shields, 81 N. C. 250.

[3] Ruggles *v.* Swanwick, 6 Minn. 526; Joannes *v.* Mudge, 6 Allen (Mass.), 245.

[4] Carr *v.* Dooley, 119 Mass. 294.

[5] See, also, McCormick *v.* Cheevers, 124 Mass. 262.

[6] Baltimore, &c., Steamboat Co. *v.* Brown, 54 Penn. St. 77; Townsend *v.* Cowler, 31 Ala. 428; Holbrook *v.* Burt, 22 Pick. (Mass.) 546; Hamilton *v.* Conger, 28 Ga. 276; Stark *v.* Littlepage, 4 Rand. (Va.) 368; Gatling *v.* Newell, 9 Ind. 572; Hunter *v.* Bilgen, 30 Ill. 228; Farrell *v.* Bean, 10 Md. 217; Sanford *v.* Handy, 23 Wend. (N. Y.) 260; Davis

part of the contract was *omitted* by the fraud of one of the parties;[1] or that the writing has been altered in a material respect.[2] If a person who cannot read or write, or who cannot speak or read the language in which a note or other obligation is written, is induced to place his signature thereto upon the assurance by the other party that it is an instrument of a different character from what it in fact is, or that it contains provisions of a different character from what it in fact does contain, parol evidence is admissible to show the facts, not to vary or control the writing, but to show that no such contract was in fact entered into, and such evidence is no more obnoxious to the general rule excluding parol evidence than is evidence to show that a party's signature to the instrument is a forgery. The object in both cases is the same, that is, to show that no such contract as is sued upon was ever entered into by the party sued.[3] If a material part has been inserted or omitted by the fraud of one of the parties, this

v. Stern, 15 La. An. 177; Hunt *v.* Carr, 3 Iowa, 581; Selden *v.* Myers, 20 How. (U. S.) 506; Van Buskirk *v.* Day, 22 Ill. 260; Harrell *v.* Hill, 19 Ark. 102; Mallory *v.* Leach, 36 Vt. 156. But it is not proper to show that the parties agreed that the writing should be a sham. Connor *v.* Carpenter, 28 Vt. 237. It is proper to show that the party's signature was procured by fraud. Lull *v.* Cass, 43 N. H. 62; Christ *v.* Diffenbach, 1 S. & P. (Penn.) 464; Prentice *v.* Russ, 16 Me. 30. This rule applies as well to deeds or other instruments under seal as to simple contracts, and a deed may be avoided by showing that it was misread or its purport falsely declared to the grantor at the time of its execution. Doe *v.* Farlee, 22 N. J. L. 289; Anthony *v.* Wilson, 14 Pick. (Mass.) 303; Farmers', &c., Bank *v.* Whinfield, 24 Wend. (N. Y.) 419; Chestnut Hill, &c., Co. *v.* Chase, 14 Conn. 123; or according to some of the cases that its execution was obtained by fraudulent misrepresentations as to the consideration of the instrument. Bliss *v.* Thompson, 4 Mass. 492; Somer *v.* Skinner, 16 id. 348; Hazard *v.* Erwin, 18 Pick. (Mass.) 95; Hoitt *v.* Halcomb, 23 N. H. 535; Chew *v.* Moffatt, 6 Munf. (Va.) 120; Leonard *v.* Bates, 1 Blackf. (Ind.) 172; but *contra*, see Vrooman *v.* Phelps, 2 John. (N. Y.) 177; Taylor *v.* King, 6 Munf. (Va.) 358; Donaldson *v.* Barton, 4 D. & B. (N. C.) 435; Rogers *v.* Colt, 1 N. J. L. 714.

[1] Chitwood *v.* Brittain, 2 N. J. Eq. 438; Phyfe *v.* Wardwell, 2 Edw. Ch. (N. Y.) 47; Watkins *v.* Stockett, 6 H. & S. (Md.) 435; Blanchard *v.* Moore, 4 J. J. Mar. (Ky.) 471; Elliott *v.* Connell, 13 Miss. 91; Anderson *v.* Bacon, 1 A. K. Mar. (Ky.) 48.

[2] Buck *v.* Appleton, 14 Me. 284.

[3] Van Buskirk *v.* Day, 22 Ill. 260; Christ *v.* Diffenbach, 1 S. & R. (Penn.) 464; Champion *v.* White, 5 Cow. (N. Y.) 508.

furnishes an exception to the rule, and parol proof is admissible to establish the fact.[1] The effect of this evidence is to show that the writing is void or that it never had any legal existence.[2] The same rule prevails as to illegality, and in an early case[3] it was established that illegality may be pleaded as a defense to an action upon a deed, and consequently to *any* contract, whether under seal or not; and in a later case[4] it was held that an obligor of a bond may show that it was given upon an illegal consideration, *whether consistent with the condition of the bond or not.* It may be said that parol proof is admissible to show that a written contract, though clothed in due form, and conferring apparently a just right, contravenes a prohibitory law in the interest of public morals, and so is a nullity. Thus, the State may show, in a contest for a succession with a duly acknowledged natural child, that the latter is the offspring of an adulterous connection.[5] Indeed, parol evidence is admissible whenever the obligation is one contracted *in fraudem legis.* It is immaterial what form may have been given to the reprobated contract.[6]

[1] Waddell *v.* Glaseell, 18 Ala. 561; Bottomley *v.* United States, 1 Story (U. S. C. C.), 135; Townsend *v.* Cowler, 31 Ala. 428; Lunday *v.* Thomas, 26 Ga. 538; Pierce *v.* Wilson, 34 Ala. 596; Hamilton *v.* Congers, 28 Ga. 276; Gatling *v.* Newell, 9 Ind. 572; Stannard *v.* McCarty, 1 Morr. (Iowa) 124; Hunt *v.* Carr, 3 Iowa, 581; Akin *v.* Drummond, 2 La. An. 92; Morris *v.* Terrenoire, id. 458; Williams *v.* Vane, id. 908; Rachal *v.* Rachal, 4 id. 500; Gayoso *v.* Delaroderie, 9 id. 278; Davis *v.* Stern, 15 id. 177; Garrett *v.* Crooks, id. 483; Barbin *v.* Gaspard, id. 439; Farrell *v.* Bean, 10 Md. 217; Holbrook *v.* Burt, 22 Pick. (Mass.) 546; Sanford *v.* Handy, 23 Wend. (N. Y.) 1260; Bartle *v.* Vasbury, 2 Grant (Penn.) Cas. 277; Hunter *v.* Bilyen, 30 Ill. 228; Baltimore, &c., Steamboat Co. *v.* Brown, 54 Penn. St. 77; Stark *v.* Littlepage, 4 Rand. (Va.) 368. In equity, parol evidence is admissible to prove fraud, or mistake, or surprise in a written agreement. But the evidence must be strong and clear. Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174; McMahon *v.* Spankler, 4 Rand. (Va.) 51. Parol testimony is admissible to show that the party was fraudulently deceived and misled as to the contents of the written instrument. Selden *v.* Myers, 20 How. (U. S.) 506.

[2] Paxton *v.* Popham, 9 East, 421; Collins *v.* Blantern, 2 Wils. 341; Martin *v.* Clarke, 8 R. I. 389; Leppoe *v.* Nat'l Union Bank, 32 Md. 136.

[3] Collins *v.* Blantern, *ante;* Corbin *v* Sistrunk, 19 Ala 203.

[4] Paxton *v.* Popham, *ante.*

[5] Succession of Fletcher, 11 La. An. 59.

[6] Lazare *v.* Jacques, 15 La. An. 599.

Circumstances which go to show that a deed or other written instrument was never duly executed by the party, may always be shown, as that the writing was misread, or that one instrument was substituted for another, and thus, that his signature thereto was fraudulently obtained,[1] or that in reading the instrument, a material part of it was suppressed,[2] or indeed any act of the other party which amounted to such a fraud upon the party executing the instrument, that it is not the instrument which he designed to execute.[3] Upon the same principle, parol evidence is admissible to show that at the time when the instrument was executed, the party executing it had not the capacity to do so, in order to negative the idea that it is his deed or contract,[4] as that he was a lunatic ;[5] or so intoxicated as not to know what he was doing ;[6] or that it was executed under duress ;[7] or that the party was under some legal disability, as coverture[8] or infancy.[9] It may also be shown that the deed was never duly received ; or was delivered merely as an escrow ; or to take effect only on a contingency which has not happened ; or that the grantee obtained it fraudulently, or in an improper manner, etc. This species of evidence has never been considered as coming within the rule which rejects parol proof, when offered to contradict a deed.[10] In Massachu-

[1] Owen's Case, 1 Bland Ch. (Md.) 391 ; Van Valkenburgh *v.* Rourk, 12 John. (N. Y.) 337 ; Swisher *v.* Williams, 37 Penn. St. 754.

[2] Morton *v.* Chandler, 8 Cow. (N. Y.) 10 ; Franchot *v.* Leach, 5 id. 508 ; Creery *v.* Holly, 14 Wend. (N. Y.) 26 ; Tribble *v* Oldham, 5 J. J. Mar. (Ky.) 141.

[3] Savage, J., in Franchot *v.* Leach, *ante*.

[4] Champion *v.* White, 5 Cow. (N. Y.) 510.

[5] Dale *v.* Roosevelt, 9 Cow. (N. Y.) 310 ; Den *v.* Clark, 10 N. J. L. 217 ; Grant *v.* Thompson, 4 Conn. 203 ; Jackson *v.* King, 4 Cow. (N. Y.) 207 ; Mitchell *v.* Kingman, 5 Pick. (Mass.) 481.

[6] Dale *v.* Roosevelt, *ante ;* Barrett *v.* Buxton, 2 Aik. (Vt.) 167 ; Prentice *v.* Osborn, 2 Paige Ch. (N. Y.) 31 ; Rice *v.* Peat, 15 John. (N. Y.) 503.

[7] Worcester *v.* Eaton, 13 Mass. 371 ; Stauffer *v.* Latstraw, 2 Watts (Penn.), 165 ; Burroughs *v.* Richman, 1 Me. 233 ; Richardson *v.* Duncan, 3 N. H. 508 ; Jackson *v.* Myers, 11 Wend. (N. Y.) 536.

[8] Dale *v.* Roosevelt, *ante.*

[9] Van Valkenburgh *v.* Rourk, 12 John. (N. Y.) 338.

[10] Roberts *v.* Jackson, 1 Wend. (N. Y.) 484 ; Titus *v.* Myers, 11 id. 536 ; Clark *v.* Gifford, 10 id. 310.

setts, if a deed with the regular evidence of complete and unqualified execution on its face, has been signed, sealed and delivered to the party, parol evidence of a contemporaneous agreement or understanding that it should not take effect until a certain event, is inadmissible, as going to vary the terms of the deed, and make that conditional which appeared to be absolute.[1] It is not competent to establish, under pretense of delivery as an escrow, conditions in the contract itself, different from its face, and repugnant to it.[2] A surety, in a joint and several bond, it has been held, may, when sued, show that he signed it on condition that others, besides those whose names are to it, would execute it, and that their signatures were not procured.[3] The principal was intrusted to procure the signatures in this case, and it does not appear that the obligees were in any manner apprised of the conditional delivery. In Louisiana a similar point arose, and the court held, that as there was nothing on the face of the bond showing that other signatures were intended, the surety could not avail himself of the breach of trust on the part of the principal, to defeat a recovery by the obligees.[4]

Sec. 28. Failure of Consideration.

The *want or failure of consideration* may also be proved by parol evidence showing that the written agreement is not binding,[5] unless it is under seal, which, in the absence of fraud, is conclusive evidence of a sufficient consideration.[6]

[1] Ward *v.* Lewis, 4 Pick. (Mass.) 518; Dix *v.* Otis, 5 id. 38.

[2] State *v.* Perry, 1 Wright (Ohio), 662.

[3] United States *v.* Leffler, 11 Pet. (U. S.) 86.

[4] Police Jury *v.* Haw, 1 Mill. (La.) 41.

[5] Bickels *v* Cunningham, 14 Miss. 358; Long *v.* Davis, 18 Ala. 801; Herrick *v.* Bean, 20 Me. 51; Smith *v.* Brooks, 18 Ga. 440; Great Western Ins Co. of Aurora *v.* Cobb, 21 Ind. 492; Collier *v.* Mahan, 21 id. 110. A person cannot, under the guise of proving the consideration of a contract by parol, add to or subtract from the written contract in any of its provisions. Howe *v.* Walker, 4 Gray (Mass.), 318; Munde *v.* Lambie, 122 Mass 336; Foster *v.* Jolly, 1 C., M. & R. 707; Solly *v.* Hinde, 2 Cr. & M. 516; Abbott *v.* Hendricks, 1 M & Gr. 791.

[6] Holbrook *v.* Holbrook, 30 Vt. 432; Johnson *v.* Bayles, 26 Ala. 576; Morris, &c., Co. *v* Ryerson, 27 N. J. L 457; Morse *v.* Shattuck, 4 N. H. 229; Kumler *v* Ferguson, 7 Minn. 442; Swafford *v.* Whipple, 3

But if *no* consideration is stated in the deed or contract, the party will be allowed to prove one by extrinsic evidence ;[1] and if the deed is expressed to be made "for divers good considerations," it may be averred and proved by parol that the bargainee gave money for his bargain.[2] But if an instrument *under seal* specifies any particular consideration, as, for instance, love and affection, and omits all mention of any other consideration, no extrinsic proof of another can in general be given, because such proof would contradict the deed.[3] Still, if the object is to establish or negative the existence of fraud, such proof will be admissible. Thus, where a conveyance purported to have been made in consideration of a certain sum and natural love and affection, in a suit to set it aside, extrinsic evidence was held admissible to show that the estates were worth much more than that sum, and that natural love and affection constituted no part of the real consideration.[4] So, where a father assigned his house and personalty to his son by deed, "in consideration of natural love and affection," and afterwards the sheriff seized

Iowa, 261 ; Lawton *v.* Buckingham, 15 id. 22 ; Emmons *v.* Littlefield, 13 Me. 233 ; Bennett *v.* Solomons, 6 Cal. 134 ; Strawbridge *v.* Cartledge, 7 Watts (Penn), 394 ; Ely *v.* Alcott, 4 Allen (Mass.), 506 ; Jones *v.* Jones, 12 Ind. 389.

[1] Peacock *v.* Monk, 1 Ves. Sr. 128 ; Merle *v* Matthews, 26 Cal. 455 ; Wood *v.* Beach, 7 Vt. 52 ; Frink *v.* Green, 5 Barb. (N. Y.) 455 ; White *v.* Weeks, 1 Penn. 486.

[2] 2 Ph. Ev 353 ; Tull *v.* Parlett, M. & M. 472 ; Benedict *v.* Lynch, 1 John. Ch. (N. Y.) 370 ; Chesson *v.* Pettijohn, 6 Ired. (N. C.) L. 121 ; Pomeroy *v.* Bailey, 43 N. H. 118 ; Norris *v.* Ham, R. M. Charlt. (Ga) 267.

[3] Peacock *v.* Monk, 1 Ves. Sr. 128 ; Gale *v.* Williamson, 8 M. & W. 408 ; Ellinger *v.* Crowl, 17 Md. 361 ; Harrison *v.* Castner, 11 Ohio St. 339 ; Thornburgh *v.* Newcastle, &c., R. R. Co., 14 Ind. 499 ; Mead *v.* Steger, 5 Port. (Ala.) 498 ; Hendricks *v* Crowley, 31 Cal. 471 ; Lutburrow *v.* Henderson, 30 Ga. 482. A recital in a note that it was given for the purchase-money of land may be contradicted by parol evidence, even between the parties. Hicks *v.* Morris, 57 Tex. 658 ; S. P. Lawe *v.* Thompson, 86 Ind. 503 ; Bragg *v.* Stanford, 82 id. 254.

[4] Filmer *v.* Gott, 7 Bro. P. C. 70 ; R. *v.* Scammonden, 3 T. R. 475. Parol evidence is held to be admissible to show a consideration in addition to that named in the deed. Vail *v.* McMillan, 17 Ohio St. 617 ; Hayden *v.* Mentzer, 10 S. & R. (Penn.) 329 ; Miller *v.* Goodwin, 8 Gray (Mass.), 542 ; Perry *v.* Central, &c., R. R. Co., 5 Caldw. (Tenn.) 138 ; Henderson *v.* Dodd, 1 Bailey (S. C.) Ch. 138.

part of the personalty under a *fi. fa.* against the father, the son, in proceeding against the sheriff, was permitted to give evidence of a valuable consideration, and thus to rebut the presumption of fraud against creditors, which a deed made by a debtor in consideration of natural love and affection *prima facie* imports.[1]

Notwithstanding the acknowledgment in a deed of the receipt of the purchase-money, it may be shown by parol that it was not in fact paid, or that it was paid by money or property, as it is nothing more than a receipt, and is open to explanation.[2] Its only effect is to estop the grantor from setting up a want of consideration, and for every other purpose it is open to explanation, and may be varied by parol proof.[3]

Sec. 29. Mistake in Instrument.

Courts of equity will also sometimes admit parol evidence to contradict or vary a writing, where, by some *mistake in fact*, it speaks a different language from what the parties intended, and where, consequently, it would be unconscientious or unjust to enforce it against either party according to its expressed terms.[4] In all cases, however, of this kind, the

[1] Gale *v.* Williamson, 8 M. & W. 405; Pott *v.* Todhunter, 2 Coll. C. R. 76; Drury *v.* Tremont Improvement Co., 13 Allen (Mass.), 168; Lamb *v.* Donovan, 19 Ind. 40; Gelpcke *v.* Blake, 19 Iowa, 263.

[2] Elder *v.* Hood, 38 Ill. 533; Vaugine *v.* Taylor, 18 Ark. 65; Coles *v.* Soulsby, 21 Cal. 47; Millard *v.* Hathaway, 27 id. 119; Callayway *v.* Hearn, 1 Houst. (Del.) 607; Bratt *v.* Bratt, 21 Md. 578; Harris *v.* Harris, 2 Harr. (Del.) 354; Ayers *v.* McConnel, 15 Ill. 230; Kimball *v.* Walker, 30 Ill. 482; Halt *v.* Perry, 3 Iowa, 579; Barbank *v.* Gould, 15 Me. 118; Bassett *v.* Bassett, 55 Me 127; Elysville Co. *v.* O'Kisko Co., 1 Md. Ch. 392; Spalding *v.* Brent, 3 id. 411; Lirgun *v.* Henderson, 1 Bland (Md.), 236; Davenport *v.* Mason, 15 Mass. 85; Wilkinson *v.* Scott, 17 id. 249; Clapp *v.* Linell, 20 Pick. (Mass.) 247; Speer *v.* Speer, 14 N. J. Eq. 240; Herbert *v.* Scofield, 9 N. J. Eq. 492; Shepard *v.* Little, 14 Johns. (N. Y.) 210; Whitbeck *v.* Whitbeck, 9 Cow. (N. Y.) 266; Baker *v.* Connell, 1 Daly (N. Y.), 469; Wesson *v.* Stevens, 2 Ired. (N. C.) Eq. 557; Deloach *v.* Turner, 6 Rich. (S. C.) 117; Gibson *v.* Fifer, 21 Tex. 260; White *v.* Miller, 22 Vt. 380.

[3] Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212.

[4] Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 211; Peterson *v.* Grover, 20 Me 363; Anderson *v.* Bacon, 1 [illegible]A. K. Mar. (Ky.) 48; Huston *v.* Stoble, 4 J. J. Mar. (Ky.) 130; Blanchard *v.* Moore, 4 id. 471; Gibson *v.* Watt,

party seeking relief undertakes a task of great difficulty,

1 McCord Ch. (S. C.) 490; Perry *v.* Pearson, 1 Humph. (Tenn.) 431; Van Ness *v.* Washington, 4 Pet. (U. S.) 232; Harrison *v.* Howard, 1 Ired. (N. C.) Eq. 407; Evans *v.* Hooper, 3 N. J. Eq. 204; Mageehan *v.* Adams, 2 Binn. (Penn.) 109. A mere clerical error may be shown in a court of law, as, an error in the date. Leggitt *v.* Buckhalter, 30 Miss. 421.

In respect to mistakes of law, as contradistinguished from mistakes of fact, see Wheaton *v.* Wheaton, 9 Conn. 96; Lowndes *v.* Chisholm, 2 McCord (S. C.) Ch. 455; Hopkins' Ex'rs *v.* Mazyck, 1 Hill Ch. (S. C.) 251; Fitzgerald *v.* Peck, 4 Litt. R. 125; Champlin *v.* Laytin, 1 Edw. Ch. (N. Y.) 467; Hunt *v.* Rousmanier, 1 Pet. (U. S.) 15; 8 Wheat. (U. S.) 174; 3 Mas. (U. S.) 294; Sims *v.* Lyle, 4 Wash. C. C. R. 301, 320; Heilner *v.* Imbrie, 6 S. & R. (Penn.) 411; Lyon *v.* Richmond, 2 John. Ch. (N. Y.) 51; Williams *v.* Hodgson, 2 H. & J. (Md.) 474; Lammat *v.* Browby, 6 id. 24; Rawstone *v.* Parr, 3 Russ. 424; Clark *v.* Dutcher, 9 Cow. (N. Y.) 674; Lawrence *v.* Beaubin, 2 Bail. (S. C.) 623; Moser *v.* Liebenguth, 2 Rawle (Penn.), 428; Haven *v.* Foster, 9 Pick. (Mass.) 112; Shotwell *v.* Murray, 1 John. Ch. (N. Y.) 512; Storrs *v.* Barker, 6 John. Ch. (N. Y.) 166; Naylor *v.* Wench, 1 Sim. & Stud. 561; Jones *v.* Watkins, 1 Stew. 81; Ward *v.* Tucker, 7 Mass. 449; Hubbard *v.* Martin, 8 Yerg. (Tenn.) 498; Dickens *v.* Jones, 6 id. 483; Besore *v.* Potter, 12 S. & R. (Penn.) 158; Robinson *v.* Wiley, 15 N. Y. 489.

As to showing fraud, surprise and mistake, in answer to a bill for a specific performance of an agreement, see 2 Story's Eq. 24 *et seq.*; Ratcliffe *v.* Allison, 3 Rand. (Va.) 537; Bradbury *v.* White, 4 Me. 391; Young *v.* Craig, 2 Bibb (Ky.), 270; Fisher *v.* May, 2 id. 451; Smith *v.* Smith, 4 id. 81; Harrison *v.* Talbot, 2 Dana (Ky.), 258; Gower *v.* Sterner, 2 Whart. (Penn.) 75, 79; Molicre *v.* The Pennsylvania Ins. Co., 5 Rawle (Penn.), 342; Wheatley *v.* Slade, 4 Sim. 126; Cathcart *v.* Robinson, 5 Pet. (U. S.) 264; Watts *v.* Waddle, 6 id., 389; Hutchinson *v.* McNutt, 1 Hamm. (Ohio) 14; Askey *v.* Poyas, 2 Dess. (S. C.) Eq. 145; Meads *v.* Lansing, 1 Hopk. Ch. (N. Y.) 124; Faure *v.* Martin, 7 N. Y. 210; Schmidt *v.* Livingston, 3 Edw. Ch. (N. Y.) 213; Best *v.* Stow, 2 Sand. Ch. (N. Y.) 298.

As to the admissibility of parol evidence, in courts of equity, for the purpose of obtaining relief against fraud, and what constitutes that species of fraud upon which those courts will interfere, see 1 Story Eq. 166–168; also id. 194 *et seq.*; Gresl. Eq. Ev. 206, 207; Wilkinson *v.* Wilkinson, 2 Dev. (N. C.) Eq. 378; Flagler *v.* Pleiss, 3 Rawle (Penn.), 345; Rice *v.* Spotswood, 6 Mon. (Ky.) 40; Boyce *v.* Grundy, 3 Pet. (U. S.) 210; Stinson *v.* McKeown, 1 Hill (N. Y.), 387.

It is clear that a party may, as plaintiff, have relief against a written contract, by having the same set aside and canceled or modified, whenever it is founded in mistake of material facts, and it would be unconscientious and unjust for the other party to enforce it. See Ball *v.* Storie, 1 Sim. & Stud. 210. And this, although the party seeking the relief drew the instrument himself. Id.; Gibson *v.* Watts, 1 McCord Ch. (S. C.) 494, 495. See further, as to the general doctrine, Chase *v.* Manhardt, 1 Bland Ch (Md.) 333; 1 Story Eq. 164; Fishback *v.* Woodford, 1 J. J. Mar. (Ky.) 84; Bierne *v.* Erskine, 5 Leigh (Va.), 59; Mc-

since a court of equity will not interfere, unless it is clearly

Mahon *v.* Spangler, 4 Rand. (Va.) 51; Anderson's Ex'r *v.* Bacon, 1 Marsh. (Ind.) 48; Love *v.* Cofer, 1 J. J. Mar. (Ky.) 327; Bodley *v.* McChord, 4 J. J. Mar. (Ky.) 475; Huston *v.* Noble, 4 J. J. Mar. (Ky.) 130; Rice's Heirs *v.* Spotswood's Heirs, 6 Mon. (Ky.) 40; Inskoe *v.* Proctor, 6 Mon. (Ky.) 312; Allen *v.* Hammond, 11 Pet. (U. S.) 63.

But, in England, it is not admissible for a plaintiff to allege a mistake, with a view of correcting the contract, and, at the same time, seek a specific performance of it in its rectified state. See Gresl. Eq. Ev. 206, 207. Most of the English cases on this subject will be found collected in the notes to 1 Story Eq. 174. The learned author remarks, in respect to this doctrine, that "it is certainly of a very artificial character, and difficult to be reconciled with the general principles of courts of equity." It is, "in effect," he says, "a declaration, that parol evidence shall be admissible to correct a writing as *against* a plaintiff, but not in *favor* of the plaintiff, seeking a specific performance. There is, therefore, no mutuality or equality in the operation of the doctrine. The ground is very clear, that a court of equity ought not to enforce a contract, where there is a mistake, against the defendant, insisting upon, and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground why equity should interfere at the instance of the party, as plaintiff, and cancel it; and if the mistake is partial only, why at his instance it should reform it. In these cases the remedial justice is equal; and the parol evidence to establish it is equally open to both parties to use as proof. Why should not the party aggrieved by a mistake in an agreement, have relief in all cases, where he is plaintiff, as well as where he is defendant? Why should not parol evidence be equally admissible to establish a mistake as the foundation of relief in each case? The rules of evidence ought certainly to work equally for the benefit of each party. Mr. Chancellor Kent has forcibly observed, 'that it cannot make any difference in the reasonableness and justice of the remedy whether the mistake was to the prejudice of one party or the other. If the court has a competent jurisdiction to correct such mistakes (and that is a point understood and settled), the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement, perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties. *Res accedent lumina rebus.*' It may be added, that, if the doctrine be founded upon the impropriety of admitting parol evidence to contradict a written agreement, that rule is not more broken in upon by the admission of it for the plaintiff, than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the Statute of Frauds, if not more intelligible, it would at least have been less inconvenient in practice. But it does not appear to have been thus restricted, although the cases in which it has been principally relied on have been of that description. It will often be quite as unconscientious for a defendant to shelter himself under a defense of this sort, against a plaintiff seeking the specific performance

convinced by the most satisfactory evidence, first, that the

of a contract, and the correction of a mistake, as it will be to enforce a contract against a defendant, which embodies a mistake to his prejudice. See Comyn's Digest, Chancery, 2 C. 4; 2 X. 3; 4 L. 2." 1 Story Eq. 175, note 1.

The doctrine of Woollam *v.* Hearn, 7 Ves. 511, and other English cases proceeding on like views, holding, that while parol evidence may be received *against* a plaintiff seeking specific performance, it will not be received in his favor to rectify a written agreement, has been distinctly repudiated in New York, and seems indeed not to have been sanctioned by any of the courts of equity in this country. See Keisselbrack *v.* Livingston, 4 John. Ch. (N. Y.) 144; Gillespie *v.* Moon, 2 id. 585; also, The Hiram, 1 Wheat. (U. S.) 444; Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 211; Hogan *v.* Delaware Ins. Co., 1 Wash. (U. S. C. C.) 422; Rosevelt *v.* Fulton, 2 Cow. (N. Y.) 129; Pattison v. Hull, id. 747; Wesley *v.* Thomas, 6 H. & J. (Md.) 24; Newsom *v.* Bufferlou, 1 Dev. Eq. 379; Gower *v.* Sterner, 2 Whart. (Penn.) 75, 79; Abbe *v.* Goodwin, 7 Conn. 377. But see Westbrook *v.* Harbeson, 2 McCord Ch. (S. C.) 112; Elder *v.* Elder, 10 Me. 80; Dwight *v.* Pomroy, 17 Mass. 303; Bradbury *v.* White, 4 Me. 391; Harrison *v.* Talbot, 2 Dana (Ky.), 250.

As to the admissibility of parol evidence, and what shall constitute part performance, see 1 Story Eq. 21 *et seq.* See also German *v.* Machin, 6 Paige (N. Y.), 288; Wetmore *v.* White, 2 Cain Cas in Er. 87; Hall *v.* Hall, 2 McCord Ch. (S. C.) 269; Miller *v.* Hower, 2 Rawle (Penn.), 53; Low *v.* Treadwell, 13 Me. 441; Brooks *v.* Wheelock, 11 Pick. (Mass.) 439; Monahan *v.* Colgin, 4 Watts (Penn.), 436; Ellis *v* Ellis, 1 Dev. (N. C.) Eq. 341.

See on the subject of bills to reform agreements, 1 Story Eq. 164 *et seq.*; McMahon *v.* Spangler, 4 Rand. (Va.) 51; Cook *v.* Preston, 2 Root, 78; Elmore *v.* Austin, 2 Root (Conn), 415; Parsons *v.* Hosmer, 2 Root (Conn.), 1; Sanford *v.* Washburne, id. 499; Chadman *v.* Allen, Kirby (Conn.), 399; Lemaster *v* Buckhart, 2 Bibb (Ky.), 29; Colyer *v.* McGee, id. 321; McCurdy *v.* Breathitt, 5 Mon. (Ky.) 534; Love *v.* Cofer, 1 J. J. Mar. (Ky.) 327; Moser *v.* Libenguth, 2 Rawle (Penn), 428; Insko *v.* Proctor, 6 Mon. (Ky.) 316; Parcels *v.* Gohegan, 2 J. J. Mar (Ky.) 133; Hunt *v.* Rousmaniere, 1 Pet. (U. S.) 1; 8 Wheat. (U. S.) 174; Burdett *v.* Simms, 3 J. J. Mar. (Ky.) 190; Harrison *v* Jameson, id. 232; Hunt *v.* Freeman, 1 Hamm. (Ohio) 501; Phœnix Ins. Co. *v.* Gurnee, 1 Paige (N. Y), 278; Rosevelt *v.* Fulton, 2 Cow. (N. Y) 129; Chamberlain *v.* Thompson, 10 Conn. 243; Gillespie *v* Moon, 2 John. Ch. (N. Y.) 585; Wheaton *v.* Wheaton, 9 Conn. 96; Young *v.* Craig, 2 Bibb (N. Y.), 270; Smith *v.* Smith, 4 id. 81; Newsom *v.* Bufferlou, 1 Dev. Eq. (N C.) 379; Gower *v.* Sterner, 2 Whart. (Penn.) 75; Dalzell *v.* Timrod, 1 Dess Eq. (S. C.) 339; Holmes *v.* Simmons, 3 Dess. Eq. (S. C) 149. See also the cases *post* in these notes, relative to wills.

In an action brought to reform a written instrument, *e. g.* a bond, the consideration of which proceeds from a third party acting for the obligee, the latter is entitled to a decree reforming the instrument on showing, *first* a plain mistake, clearly made out by satisfactory proofs; and, *second*, that the part omitted or inserted, was so omitted or inserted

mistake complained of really exists, and next, that it is such a mistake as ought to be corrected.[1] A *plaintiff* may seek the relief in equity by filing a bill either to *reform* the writing, in which event it will be necessary to satisfy the court that there was a mistake on *both* sides, or to *rescind* the instrument, in which case, though conclusive proof of error or surprise on the plaintiff's part alone will suffice,[2] it must appear that the mistake was one of vital importance.[3] In either of these cases, if the defendant by his answer denies the case as set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses, and has no documentary evidence to adduce,—such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like,—the plaintiff's position will be well nigh desperate, though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the court in granting the relief prayed.[4] A *defendant*, also, against whom a spe-

contrary to the intent of both parties, and under a mutual mistake. Nevins *v.* Dunlop, 33 N. Y. 676. Mr. Justice Brown, in delivering the opinion of the court, adopts the language of Chief Justice Spencer, in Lyman *v.* The Utica Ins. Co., 17 John. (N. Y.) 373: "It is not enough, in cases of this kind, to show the sense and intention of one of the parties to the contract. It must be shown incontrovertibly that the sense and intention of the other party concurred in it; in other words, it must be proved that they both understood the contract as it is alleged it ought to have been, and in fact it was, but for the mistake. It would be the height of injustice to alter a contract on the ground of mistake, when the mistake arises from misconception of one of the parties in consequence of his imperfect explanation of his intentions. If it be clearly shown that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail unless it be further shown that the other party agreed to it in the same way, and that the intention of both of them was by mistake misrepresented by the written contract."

See also 1 Story Eq. 160; also Elder *v.* Elder, 10 Me. 80; Hodgson *v.* Hancock, 1 Y. & Jer. 317; United States *v.* Monroe, 5 Mas. (U. S.) 571; Phœnix Ins. Co. *v.* Gurnee, 1 Paige (N. Y.), 278; Watkins *v.* Stockett, 6 H. & J. (Md.) 435; Graves *v.* The Boston Marine Ins. Co., 2 Cranch (U. S.) 419; Dupree *v.* McDonald, 4 Dess. Eq. (S. C.) 209; Lyman *v.* The United Ins. Co., 2 John. Ch. (N. Y.) 630; Gillespie *v.* Moon, id. 585; Harris *v.* Dinkins, 4 Dess. Eq. (S. C.) 60; Abbie *v.* Goodwin, 7 Conn. 377.

[1] M. of Townsend *v.* Strangroom, 6 Ves. 339; Mortimer *v.* Shortall, 2 Dru. & W. 371; Gillespie *v.* Moon, 2 John. Ch. (N. Y.) 585.

[2] Mortimer *v.* Shortall, 2 Dru. & W. 372.

[3] 1 Story Eq. Jur. § 144, *n.*

[4] Mortimer *v.* Shortall, 2 Dru. & W. 374; Alexander *v.* Crosbie, R.

cific performance of a written agreement is sought, may insist by way of answer upon the mistake, and may establish its existence by parol evidence, because he may rely on any matter which shows it to be inequitable to enforce the contract.[1]

Sec. 30. To Show a Waiver, Alteration, or a Discharge of the Contract.

It is always competent for a party to a written contract to show that it was *subsequently* to the execution of a written contract, abandoned by the parties thereto, either in whole or in part, or that some of its provisions were waived,[2] and this applies as well to contracts under seal as to simple contracts,[3] and it has been held that even the waiver of a condition of a deed may be shown by parol.[4] As to the effect of a waiver by parol of the conditions of an instrument under seal, and the substitution of new parol conditions, it may be said that, if the entire contract under seal is not abandoned, the whole, by such a change, is reduced to the character of a simple contract so that assumpsit, instead of debt or covenant is the proper remedy thereon.[5] Thus, in a Massachusetts case,[6] an action of assumpsit was brought for work and labor, etc., and the defendant set up in defense that the whole took place under a special contract under seal, which was produced. The plaintiff showed that being unable to go on after having partly performed his contract, without material loss, he refused to proceed, but that the defendant, by parol, thereupon promised him that if he

temp. Sugden, 150; M. of Townsend *v.* Strangroom, 6 Ves. 339; Gillespie *v.* Moon, 2 John. Ch. (N. Y.) 600.

[1] Davies *v.* Fitton, 2 Dr. & W. 232; M. of Townsend *v.* Strangroom, 6 Ves. 328.

[2] Raffensberger *v.* Collinson, 28 Penn. St. 426; Willey *v.* Hall, 8 Iowa, 62; Chiles *v.* Jones, 3 B. Mon. (Ky.) 51; Bryan *v.* Hunt, 4 Sneed (Tenn.), 543; Wood *v.* Perry, 1 Barb. (N. Y.) 114.

[3] Flinn *v.* McKean, 6 Duer (N. Y.). 203; Leathe *v.* Bullard, 8 Gray (Mass.), 545; Lefevre *v.* Lefevre, 4 S. & R. (Penn.) 241; Cringum *v.* Nicholson, 1 H. & M. (Va.) 435.

[4] Leathe *v.* Bullard, *ante*. In Whitcher *v.* Shattuck, 3 Allen (Mass.), 318, it was held that under a chattel mortgage, reserving to the mortgagor possession and control of the goods until after default, it may be shown by parol that the mortgagor waived this right.

[5] Hydeville Co. *v.* Eagle R. R. & Slate Co., 44 Vt. 395.

[6] Munroe *v.* Perkins, 9 Pick. (Mass.) 298.

would go on he should be paid for the labor, etc., and should not suffer, and upon the faith of such parol promise he went on and performed the labor, etc., for which he sought to recover.[1]

The time for the performance of a contract, whether under seal or not, may be enlarged by parol,[2] and the time for the performance of the condition of a bond may also be so enlarged.[3] Thus, in a New York case,[4] an action was brought upon a bond conditioned that the defendant, by a given day, should procure and deliver to the plaintiff a certain bond and mortgage, and discharge the same of record. The defendant did procure the bond and mortgage, and offered them to the plaintiff, proposing to do whatever else he required to discharge the mortgage of record; but the plaintiff, not knowing what was necessary, agreed by parol to waive a literal performance in this respect, if the defendant would do another thing, which he afterwards did; held, that evidence of the parol waiver, etc., was admissible, and amounted to a defense. The court went upon the ground, that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. Where the condition of a bond was to raise a mill, the obligor came to the obligee and told him everything was ready to erect the mill, and asked him when he would have him come and put it up; the obligee answered, that he would not have it, and discharged him entirely of erecting the mill, and that was held sufficient to excuse him from the performance.[5] In an English case,[6] Lord Kenyon held, that to an action of covenant on a charter party, for the demurrage which was stipulated in it, the defendant might plead that the covenantee, who was the master and owner of the ship, verbally

[1] See also to the same effect, Lattemore *v.* Hurson, 14 John. (N. Y.) 330; Allen *v.* Jaquish, 12 Wend. (N. Y.) 628.

[2] Friess *v.* Rider, 24 N. Y. 367.

[3] Stone *v.* Sprague, 20 Barb. (N. Y.) 5 9; Esmond *v.* Van Benschoten, 12 id. 366; Neil *v.* Tilman, 1 Bailey (S. C.), 538 *n.*

[4] Fleming *v.* Gilbert, 3 John. (N. Y.) 328.

[5] Fleming *v.* Gilbert, *supra*, *per* Thompson, J., citing 1 Roll Abr. 453, pl. 5, Year-Book, 2 Hen. VI, 37.

[6] Radcliffe *v.* Pemberton, 1 Esq. 35.

permitted the delay, and agreed not to exact any demurrage, but waived all claim to it.[1] So where the plaintiff sued on a breach of covenant, for not giving a deed, it was held a good plea, and the defendant would have given a deed at the time stipulated, but the plaintiff objected, and said when he wished the deed he would apply for it.[2]

In a New York case,[3] the action was on notes, payable in specific articles. It appeared that the consideration of the notes was a bond of the plaintiff, by which the latter obligated himself to convey certain premises to the former; that, by a subsequent parol agreement, the parties had stipulated to rescind the contract of sale; and that the plaintiff, pursuant to this arrangement, had re-entered upon the premises, and finally sold them to another individual. The court held, that though the bond was not canceled or given up, or any of the papers changed, yet by the parol agreement, and the acts of the parties under it, the bond was discharged, and, therefore, no action would lie on the notes. In a later case,[4] the defendants being sued on a bond given by them as sureties of a deputy sheriff, set up by way of plea, a parol agreement of the sheriff that *he would release them.* No consideration was alleged for the agreement, and this the court, on demurrer, adjudged fatal to the plea. They, however, intimated an opinion, that a parol agreement, executory in its character, could not discharge a covenant.

Sec. 31. Not Admissible to show Warranty.

The rule is, that where a contract for the sale of property has been reduced to writing, *and is evidently complete in itself*, it is not competent for the parties to engraft new terms or conditions thereon in the form of a warranty;[5] but where the con-

[1] Thresh *v.* Rake, id. 53.

[2] Baker *v.* Whiteside, 1 Breese (Ill.), 132.

[3] Dearborn *v.* Cross, 7 Cow. (N. Y.) 48.

[4] Barnard *v.* Darling, 11 Wend. (N. Y.) 22.

[5] Mast *v.* Pearce, 58 Iowa, 579; Jolliff *v.* Collins, 20 Mo. 338; Lamb *v.* Crafts, 12 Met. (Mass.) 353; Reed *v.* Wood, 9 Vt. 285; Shepherd *v.* Gilroy, 46 Iowa, 193; Mumford *v.* McPherson, 1 John. (N. Y.) 414; Van Ostrand *v.* Reed, 1 Wend. (N. Y.) 424; McMullain *v.* Thomas, 43 Conn. 252; Rice *v.* Forsythe, 41 Md. 389; Dean *v.* Mason, 4 Conn. 428; Salem, &c., Co. *v.* Adams, 23 Pick. (Mass.)

tract as expressed in the writing is manifestly incomplete, parol evidence is admissible to show a contemporaneous agreement that the property should be of a certain quality, kind or quantity.[1] The rule as stated was held in the New York case cited, *ante*, under the following facts: The parties entered into a parol agreement that the plaintiff should furnish the defendant with certain machinery at a specified price, and that the defendant should accept and pay for the same in a specified manner, and that the plaintiff should guarantee that the machines should do the defendant's work satisfactorily. The agreement was reduced to writing and signed, not including the guaranty, and it was held that parol evidence was admissible to add the guaranty. The court placed its decision expressly upon the ground that the agreement relating to the guaranty was collateral, and that the writing was manifestly, as it was in fact found to be, incomplete. The court predicated its doctrine upon an early English case,[2] and an early case in New York,[3] and so far as the doctrine of the two cases referred to is concerned, there can be no question as to their accuracy, as in neither case did the writing purport to embrace the entire contract. But in the principal case,[4] *the writing was evidently complete and was signed by both parties.* There was nothing upon the face of the contract from which a presumption that it was incomplete could be drawn. It is true that the referee found as a fact that it was incomplete, but if this circumstance is to furnish a ground for the admission of such evidence, then it opens the way for its admission in every case *where the jury find that such an agreement was in fact made, and*

256; Boardman *v.* Spooner, 13 Allen (Mass.), 361; Kain *v.* Old, 2 B. & C. 627; Spooks *v.* Messick, 65 N. C. 440; The Johnston Co. *v.* Bartley, 81 Ind. 406; Lamb *v.* Crafts, 12 Met. (Mass.) 353; Battens *v.* Sellers, 5 H. & J. (Md.) 117; Froreich *v.* Gammon, 28 Minn. 476; Wilson *v.* Marsh, 1 John. (N. Y.) 503; Whitmore *v.* So. Boston Iron Co., 2 Allen (Mass.), 78; Reed *v.* Wood, 9 Vt. 285; Keller *v.* Webb, 126 Mass. 393; Frost *v.* Blanchard, 97 Mass. 155; Etheridge *v.* Pulin, 72 N. C. 213; Naumberg *v.* Young, 35 N. J. L. 331.

[1] Chapin *v.* Dobson, 78 N. Y. 74; Scott *v.* Sweet, 2 G. Green (Iowa), 224.

[2] Jeffrey *v.* Walton, 1 Stark. 385.

[3] Battemore *v.* Pierce, 3 Hill (N. Y.), 171.

[4] Dobson *v.* Chapin, *ante*.

it does not conflict with or antagonize any of the stipulations in the written contract. The court says: "The written contract and the guaranty do not relate to the same subject-matter. The contract is limited to a particular machine, as such, the guaranty is limited to the capacity of the machine." But the court seems to have lost sight of the fact that *both* were a part of an *entire contract*, and that there was no pretense *that two separate and distinct contracts relating to the matter were entered into*, nor was there any pretense that the omission of the guaranty from the writing *was brought about by the fraud of the plaintiffs*, but that the omission, if not intended by the parties, was the result of accident or a mistake, and it seems to us that the only remedy open to the defendant was to seek a reformation of the contract upon that ground, and that the doctrine held by the court is contrary to the general drift of authority, and carried to its legitimate sequence would result in a disastrous relaxation of a highly salutary rule of evidence. There are a class of cases where evidence of a parol agreement, contemporaneous with the written agreement, is admissible *when the parol agreement was an inducement to the execution of the written agreement.*[1] But this case does not seem to come within the rule of those cases, or have any of the essential features requisite to bring it within the exception upon this ground. In an English case,[2] the rule which is universally acted upon, that when the contract is finally consummated, all prior conversations and negotiations are merged therein, was recognized. In that case, the bill of sale in the usual form contained no warranty that the vessel sold was copper-fastened. There had been a previous written representation by the vendor that she was copper-fastened. The court held that this prior representation formed no part of the contract and was not a warranty. "Where," said ABBOTT, C. J., "the whole matter passes in parcel, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement

[1] Pierce *v.* Woodward, 6 Pick. (Mass.) 206; Shugart *v.* Moore, 78 Penn. St. 469; Pamelton Coal Co. *v.* McShain, 75 id. 238.

[2] Kain *v.* Old, 6 B. & C. 627.

of a bargain *may be excluded by the language used at its termination. But if a contract be in the end reduced to writing, nothing which is not found in writing can be considered as a part of the contract.* A matter antecedent to and *dehors* the writing, may in some cases be received in evidence, *as showing the inducement to the contract*, such as a representation of some particular quality or incident to the thing sold; *but the buyer is not at liberty to show such a representation unless he can also show that the seller, by some fraud, prevented him from discovering a fault which he, the seller, knew to exist.*" "The only safe criterion," says DEPUE, J.,[1] in a very able and exhaustive opinion, "of the completeness of a written contract as a full expression of the terms of a party's agreement, is the contract itself. When the parties have deliberately put their engagements into writing in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance; and consequently all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before or after the time of the completion of the contract, will be rejected."[2] In the Massachusetts case,[3] before cited, it was attempted to engraft upon a lease a parol warranty by the landlord that the premises were fit for the purpose for which they were let; but the evidence was rejected, SHAW, C. J., saying: "If there was any warranty, express or implied, it was a part of the contract of hiring and not something separate and independent, and must therefore be found in one of the items or terms of that contract." So where a lease is silent as to repairs, it cannot be shown by parol that the landlord agreed to make the repairs.[4] In a New York case[5] there was a lease of a house and furniture, and a schedule of the furniture was annexed to the lease. In an action to cancel the

[1] Naumberg *v.* Young, 35 N. J. L. 331.

[2] Crane *v.* Elizabeth, &c., Ass'n, 29 N. J. L. 305; Powell *v.* Edmunds, 12 East, 6; Dutton *v.* Gerrish, 9 Cush. (Mass.) 89; Sheckles *v.* Sax, 1 E. D. S. (N. Y. C. P.) 253; Hei *v.* Heller, 53 Wis. 415.

[3] Dutton *v.* Gerrish, *ante*.

[4] 3 Starkie Ev. 1007. See opinion of GHALSON, J., in Howard *v.* Thomas, 12 Ohio St. 201.

[5] Wilson *v.* Deen, 74 N. Y. 531.

lease, oral testimony to show that the lessor agreed that certain deficiencies in the furniture should be made up, was rejected.[1] In an Iowa case,[2] the doctrine of the New York case[3] was expressly repudiated as being unsound and against authority.

But where the contract is evidently incomplete, being merely an informal bill or receipt and not intended to embrace the entire contract, parol evidence of a warranty of the goods is admissible.[4] Thus, where the plaintiff purchased a horse of the defendant, and received from him a memorandum of purchase in writing. The plaintiff said that when he treated for the purchase of the horse the defendant said that if he did not work well and go quietly in spare harness the plaintiff could send him back and have his money returned, and after some further talk the plaintiff bought the horse. The memorandum of sale contained no mention of the warranty. The horse proved to be vicious and unruly, and the plaintiff took him back and demanded a return of his money. The defendant insisted that the plaintiff was concluded by the writing from showing the warranty, but the evidence was admitted and the plaintiff had a verdict which was sustained, LORD ABINGER, C. B., saying: "If there has been a parol agreement, which is afterwards reduced by the parties into writing, that writing alone must be looked to to ascertain the terms of the contract; but the principle does not apply here; there was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant; the contract is first concluded by parol, and afterwards the paper is drawn up,

[1] Emery *v* Perry, 17 L. T. U. S. 152.

[2] Mast *v.* Pearce, 58 Iowa, 579; 43 Am. Rep. 125.

[3] Chapin *v.* Dobson, 78 N. Y. 34; 34 Am. Rep. 512.

[4] Henson *v.* Henderson, 21 N. H. 224; Perrins *v.* Cooley, 39 N. J. L. 449; Hazard *v.* Loving, 19 Cush. (Mass.) 267; Henshaw *v.* Robbins, 3 Met. (Mass.) 136; Bradford *v.* Manly, 13 Mass. 139; Williams *v.* Shafford, 8 Pick. (Mass.) 250; Schenck *v.* Saunders, 13 Gray (Mass.), 37; Wallace *v.* Rogers, 2 N. H. 506; Bushtel *v.* The Mason Lumber Co., 1 Flip. (U. S. C. C.) 640; Foot *v.* Bentley, 44 N. Y. 166; Hildreth *v.* O'Brien, 10 Allen (Mass.), 144; Frost *v.* Blanchard, 10 id. 155; Fletcher *v.* Willard, 14 Pick. (Mass.) 464; Stacy *v.* Kemp, 97 Mass. 168; Atwater *v.* Clancy, 107 id. 369.

which appears to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not containing the terms of the contract itself." Where a bill of parcels shows merely a sale of "cloves," parol evidence is admissible to show what kind of cloves were exhibited as a sample at the time of sale.[1] So where the vendor, in a written agreement, agreed to ship to a person a certain quantity of "good fine wine," it was held that parol evidence was admissible to show the actual terms of the sale and that the wine shipped was that selected by the person himself.[2] But where the goods sold are of a specified kind, parol evidence is not admissible to show that shortly before the sale the vendee inspected particular goods in the vendor's possession and that those were the goods referred to in the contract.[3]

Sec. 32. To show that Writing apparently absolute, is not.

Parol evidence is admissible especially in a court of equity to show that a writing which, upon its face, is apparently absolute, was intended only as a security,[4] as, that a deed, apparently absolute, was only intended as a mortgage ;[5] and the same rule prevails as to a conveyance of personal property,[6] or to the assignment of a mortgage.[7] Certificates of stock absolute on their face may be shown to be held only as security for a debt or loan.[8] A bill of sale of a ship may be shown to have been given only as collateral security,[9] and

[1] Bradford *v.* Manly, 13 Mass. 139.

[2] Hogins *v.* Plympton, 11 Pick. (Mass.) 97.

[3] Watsontown Car Manufactory *v.* Elensport Lumber Co., 99 Penn. St. 605.

[4] Fletcher *v.* Willard, 14 Pick. (Mass.) 464; Caswell *v.* Keith, 12 Gray (Mass.), 351. In those States where equity powers are conferred upon courts of law, the latter may, in an action of law, in the exercise of its equity powers, declare a deed, absolute on its face, to be a mortgage, and parol evidence is admissible to establish the fact. Stinchfield *v.* Millikin, 71 Me. 567; Dispande *v.* Walbridge, 15 N. Y 374.

[5] Brewster *v.* Davis, 56 Tex. 478. Especially in equity, where these questions are usually raised. Campbell *v.* Dearborn, 109 Mass. 130; Hassan *v.* Barrett, 115 Mass. 257; Maori *v.* Albro, 129 Mass. 9; Budd *v.* Van Orden, 33 N. J. Eq. 143; Hunt *v.* Middleworth, 44 Mich. 448.

[6] Newton *v.* Fay, 10 Allen (Mass.), 595.

[7] Pond *v.* Eddy, 118 Mass. 113.

[8] Burgess *v.* Seligman, 107 U. S. 20; Ginz *v.* Stumph, 73 Ind. 209.

[9] Howard *v.* Odell, 1 Allen (Mass.), 85; Blanchard *v.* Fearing, 4 Allen (Mass.), 118.

the same is true as to any transfer of personal property.[1] But as to deeds, it may be said that except in those States where, by statute, courts of law are endowed with equity powers, parol evidence is not admissible in courts of law to show that a deed absolute on its face was intended as a trust or as a mortgage. In reference to the admission of such evidence in equity for the purpose of changing a conveyance apparently absolute into a mortgage, it is clear that it can only be done upon some ground which will authorize an inquiry as to the real intention, independent of the one expressed in the writing. But how far can this inquiry go? Is it limited to the ascertainment of what the instrument would have expressed, had it not been for some mistake of the scrivener, some fraud of the opposite party, or some other intervening circumstance, constituting in itself a sufficient ground of relief in respect to written instruments generally in that court? — or may the court conform the instrument to an intent not only unexpressed, but which the parties, trusting at the time to each other, did not mean it should express? Upon these and various other points, the cases are by no means uniform.[2]

[1] Hazard *v.* Leving, 10 Cush. (Mass.) 267; Caswell *v.* Keith, 12 Gray (Mass.), 351.

[2] As to the general doctrine, see 2 Story's Eq. 287; 4 Kent's Comm. 142. See as to the rule in England, Maxwell *v.* Montacute, 1 Prec. in Ch. 526; Walker *v.* Walker, 2 Atk. 99; Joynes *v.* Stratham, 3 id. 389; Vernon *v.* Bethel, 2 Eden, 113; Harris *v.* Horwell, Gilb. Eq. Cas. 11; Dixon *v.* Parker, 2 Ves. Sr. 219; in the United States Court, Hughes *v.* Edwards, 9 Wheat. (U. S.) 489; New York, Marks *v.* Pell, 1 John. Ch. (N. Y.) 594; Strong *v.* Stewart, 4 id. 167; James *v.* Johnson, 6 id. 417; Clark *v.* Henry, 2 Cow. (N. Y.) 324; Whittick *v.* [illegible], 1 Paige Ch. (N. Y.) 206; S[illegible] *v.* Manhattan Co., id. 48; Patchin *v.* Pierce, 12 Wend. (N. Y.) 64; Washburn *v.* Merrills, 1 Day (Conn.), 139; Reading *v.* Weston, 8 Conn. 177; Dean *v.* Dean, 6 Conn. 285; Brown *v.* Wright, 4 Yerg. (Tenn.) 57; Ohio, Miami Exporting Co. *v.* The United States Bank, 1 Wright (Ohio), 249; Mercer *v.* Blair, Litt. Sel. Cas. (Ky.) 412; Thompson *v.* Patton, 5 Litt. 74; Lewis *v.* Robards, 3 Monroe, 409; Murphy *v.* Trigg, 1 id. 72; Lindley *v.* Sharp, 7 id. 252; Irby *v.* Little, 4 Dess. Eq. (S. C.) 422; Todd *v.* Rivers' Ex'rs, 1 id. 155; Lloyd *v.* Ingliss, id. 333; Fitzpatrick *v.* Smith, id. 345; Hatter *v.* Etenaud, 2 id. 570; and see Stinson *v.* McKeown, 1 Hill (S. C.), 387; Ross *v.* Norvell, 1 Wash. (Va.) 14; King *v.* Newman, 2 Munf. (N. C.) 40; Robertson *v.* Campbell, 2 Call (Va.), 241; Streator *v.* Jones, 3 Hawks

It may be well to say that the Pennsylvania cases, and cases arising in other States where courts at law possess equity powers, on the subject of oral evidence, in respect to written instruments, are not safe guides when the inquiry is simply as to the rule *at law*. In the main, they agree in their results with the decisions in equity; but, to one accustomed to see the distinction between chancery and strict legal powers preserved in some way, they require to be read and used with more than ordinary caution, from the fact that, while the proceedings present all the external appearance of a suit at law, the judgment, in many instances, involves principles peculiar to a court of equity. Thus, judgment will sometimes be rendered for the plaintiff in the action of ejectment, when a chancellor would enforce a performance of an agreement for the land, or decree a conveyance.[1] Mistakes and frauds, in respect to written instruments, may be shown, in actions of debt, assumpsit, etc., brought upon them, and the court will relieve by acting upon them precisely as if the intent proved *aliunde* were expressed.[2] Various other peculiarities arise out of this blending of legal forms with equitable principles, which we have not the space to refer to here. It is there said that "the jurisprudence of these States now is, what the common

(N. C.), 423; 1 Murph. (N. C.) 449; Dickenson v. Dickenson, 2 id. 279; Jackson *v.* Blount, 2 Dev. (N. C.) Eq. 555; Anonymous, 2 Hayw. (N. C.) 26; Watkins *v.* Stockett, 6 H. & J. (Md.) 435; Wesley *v.* Thomas, id. 24; Jones *v.* Sluby, 5 H. & J. (Md.) 372; Hudson *v.* Isbell, 5 S. & P. (Ala.) 67; English *v.* Lane, 1 Port. (Ala.) 328; Aborn *v.* Bennet, 2 Blackf. (Ind.) 101; Wharf *v.* Howell, 5 Binn. (Penn.) 499; Thompson *v.* White, 1 Dall. (Penn.) 426, 427.

[1] Hawn *v.* Norris, 4 Binn. (Penn.) 78; Moody *v.* Van Dyke, id. 41; Peebles *v.* Reeding, 8 S. & R. 491.

[2] See Moser *v.* Libenguth, 2 Rawle (Penn.), 428; Christine *v.* Whitehall, 16 S. & R. (Penn.) 98; Hultz *v.* Wright, id. 345; Richart *v.* Beildeman, 17 id. 42; Jordan *v.* Cooper, 3 id. 546; Collom *v.* Hocker, 4 Rawle (Penn.), 108; Thompson *v.* White, 1 Dall. (Penn.) 426; Mackey *v.* Brownfield, 13 S. & R. (Penn.) 239; Campbell *v.* M'Clenachan, 6 id. 171; Christ *v.* Devebaugh, 1 id. 466; Cozzens *v.* Stephenson, 6 id. 421; Baring *v.* Shippen, 2 Binn. (Penn.) 154; Kelly v. Thompson, 7 Watts (Penn.), 404, 405; Besore *v.* Potter, 12 S. & R (Penn.) 154, 158; Heilner *v.* Imbrie, 6 id. 411; Weaver *v.* Shyrock, id. 262; Shepherd *v.* Watson, 1 Watts (Penn.), 36; King *v.* Stubbs, 14 S. & R. (Penn.) 206; Collam *v.* Hocker, 1 Rawle (Penn.), 108.

law of England would have been, if accidental circumstances had not caused the elevation of the Court of Chancery."

It is obvious, that written stipulations may be inserted in an instrument from various causes besides that of a conviction of the truth of what is expressed. So, for reasons sufficient *to influence the immediate parties*, the writing may be so fashioned as not to express the whole truth. While, therefore, this conventional species of evidence will, in general, as between those who created it for their own purposes, conclude them, and others standing in the like predicament, from showing any intent contrary to or beyond what the writing expresses; those who had no agency in the matter ought not to be injuriously affected thereby. Therefore, whenever it becomes material, strangers may aver and prove the *real intention*, as contradistinguished from the *intention expressed*.[1] But they must have an interest in investigating and knowing the real truth, in other words, the fact of the interest sought to be established must be *relevant;* or, the exception in favor of strangers extends only to allow them to adduce parol testimony to prevent a fraudulent operation of the instrument upon their rights.

The right of a creditor to show, by parol, that a conveyance, executed by his debtor, is, in reality, a mortgage, with a view of establishing that it was given to screen the property from being seized on execution, etc., has never been denied. Yet, where the intention was admitted to be *bona fide*, and no ground existed for the imputation of fraud, the fact that the conveyance was a mortgage was held immaterial, and the evidence adduced inadmissible.[2] The fact of the consideration being paid, or not, may be material, by

[1] Krider *v.* Lafferty, 1 Whart. (Penn.) 303; Berlin *v.* Norwich, 10 John. (N. Y.) 229; *per* TAYLOR, J., in Brooks *v.* Maltbie, 4 S. & P. 106; Whitbeck *v.* Whitbeck, 9 Cow. (N. Y.) 270; Hayne *v.* Campbell, 6 Mon. (Ky.) 292; Johnson *v.* Blackman, 11 Conn. 351.

[2] Stanton *v.* Commonwealth, 2 Dana (Ky.), 397; Reed *v.* Jewett, 5 Me. 96; Kelly *v.* Thompson, 7 Watts (Penn.), 401; New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275; Harrison *v.* Trustees of Phillips Academy, 12 Mass. 456; Jewett *v.* Warren, id. 300; Bartlet *v.* Williams, 1 Pick. (Mass.) 295; Badlam *v.* Tucker, id. 389; Brooks *v.* Powers, 15 Mass. 247; Haskell *v.* Greely, 3 Me. 425.

way of establishing or rebutting fraud, as it respects creditors; but, if it appears that there was no fraud, whether the consideration expressed was, in fact, paid, or only agreed to be paid, is immaterial.[1]

Where a deed, absolute on its face, was relied on as a circumstance to show that credit for certain repairs upon the premises was given to the grantee, it was held that the latter might show by parol that the premises were his only in trust for a third person, who received the rents and profits, and that the party making the repairs knew this before he commenced.[2] So in New York, where the master of a ship sued A. for his wages, and on the trial, to show that the defendant was liable, gave in evidence an absolute bill of sale of the ship to the defendant, executed by M., it was held that, as against the master, it was competent for the defendant to prove by parol that M. was the real owner, that the bill of sale was given as collateral security by way of mortgage, that the defendant had no interest in the voyage, and that these facts were known to the plaintiff, who contracted with M. originally as to his services.[3]

Sec. 33. When Independent Contract is entered into as an Inducement to the Execution of the Principal Contract.

Where a verbal contract or promise is made in reference to a collateral matter *as an inducement to obtain the execution of the written contract*, it may be shown by parol. Thus, in a Pennsylvania case,[4] the written agreement was "to transport at such times as you may desire, 10,000 tons of coal." The court held that parol evidence was competent to show that the plaintiff refused to sign the contract unless it was inserted that the coal should be furnished before October 1st, and that the defendant then said, "That is understood," and the plaintiff thereupon signed the contract. The court put the admission of the evidence upon the ground that the

[1] See Sparrow *v.* Smith, 5 Conn. 113; Newbury *v.* Bulkley, 5 Day (Conn.), 384.

[2] Tripp *v.* Hathaway, 15 Pick. (Mass.) 47.

[3] Champlin *v.* Butler, 18 John. (N. Y.) 169.

[4] Powelton Coal Co. *v.* McShain, 75 Penn. St. 238; Campbell *v.* McClenachan, 6 S. & R. (Penn.) 171.

attempt of the defendant afterwards to take advantage of the omission of the promise from the contract was a fraud upon the defendant, who was induced to execute it upon such promise, and consequently that he might show the truth of the matter.[1] This rule was acted upon in another case in that State,[2] in which evidence was admitted in an action brought by a tenant against his landlord for a breach of contract, that he was induced to sign the lease upon an oral promise by the landlord to build a barn upon the premises before harvest time. So, in a Massachusetts case,[3] where the defendant sold the plaintiff a piece of land and a store, and at the same time, under a certain agreement, not to carry on the same business within certain prescribed limits, it was held that the agreement being a part of the inducement to the purchase, was made upon a valuable consideration, and that parol evidence was admissible to establish it. But in these cases it will be observed that the parol contract was a direct inducement to the execution of the written contract, and that the contract did not in any way relate to the subject-matter of the parol contract. In a later case in Massachusetts,[4] where the consideration of a note consisted in part of the price of a fish stand which had been paid and indorsed on the note, and in part of an agreement on the part of the payee not to engage in the fish business in competition with the promisor, and the terms and conditions of the sale were reduced to writing, which contained no reference to the good will of the business, it was held in an action on the note between the original parties that the promisor could not prove in defense that at the time of the sale *a verbal contract* was made that the payee would not engage in the fish business for a year, and that this agreement had been violated. In a still later case in that State,[5] it was held that if a written contract is entered into by which one promises to give to

[1] Clark *v.* Partridge, 2 Penn. St. 13; Dutton *v.* Tilden, 14 id. 49.

[2] Shugart *v.* Moore, 78 Penn. St. 469.

[3] Pierce *v.* Woodward, 6 Pick. (Mass.) 206.

[4] Wilson *v.* Sherburne, 6 Cush. (Mass.) 68.

[5] Doyle *v.* Dixon, 12 Allen (Mass.), 576.

another "a free and full possession of his stock and store for the full term of five years at a yearly rent as understood by both," for which a certain bonus and also a market price for the stock are agreed to be paid, parol evidence is not admissible to show that this was executed only as a memorandum and partial statement of the agreement for a special purpose, and that another independent oral agreement was made at the same time and upon the same consideration that the seller should not engage in a similar business in the same place for five years.

Sec. 34. Several Writings may be looked at to determine the real Contract and Intention of the Parties.

Where two or more contemporaneous writings relating to the same subject-matter were entered into by the parties, the court may look to all of them for the purpose of ascertaining the real intention of the parties; and if there is any discrepancy between them, it is a question of fact for the jury what their real intention was,[1] provided the papers are all of equal solemnity with the principal document, and that no oral testimony is required for the purpose of connecting them therewith.[2] In a recent Massachusetts case[3] parol evidence was admitted to show the intention of the parties as to the payment of interest upon notes which upon their face did not bear interest. But in that case the notes were secured by mortgage upon real estate, which was conditioned to be void upon the payment of the aggregate amount of the notes within eighteen months from date, *with interest at the rate of six per cent* per annum. The notes and mortgage were paid, together with the interest thereon, and the defendants (the payers) brought an action against the plaintiffs to recover back the interest. The plaintiffs then brought a bill in equity to restrain the prosecution of the action at law upon

[1] Payson *v.* Lamson, 134 Mass. 593.

[2] Leeds *v.* Lancashire, 2 Camp. 205; Hartley *v.* Wilkinson, 4 Camp. 127; Bell *v.* Bruen, 17 Pet. (U. S.) 761; Couch *v.* Meeker, 2 Conn. 302; Davlin *v.* Hill, 14 Me. 434; Lee *v.* Dick, 10 Pet. (U. S.) 482; Gale *v.* Williamson, 8 M. & W. 405; Hunt *v.* Livermore, 5 Pick. (Mass.) 395; Stone *v.* Metcalf, 1 Stark. 53.

[3] Payson *v.* Lamson, 134 Mass. 593.

the ground that the understanding of the parties was, that the notes were to bear interest, but through the fraud of the defendants, and through accident and mistake upon their own part, the notes were drawn without interest, and claiming that they were remediless at law. The court dismissed the bill, ALLEN, J., saying: "Where two papers are executed at the same time, relating to the same contract or transaction, both may be looked at for the purpose of showing what the actual contract or transaction was. If, on examination, it appears that they are in some respects inconsistent, as, for example, if a contract is executed in duplicate, and the two parts, which ought to be alike, are found to be different, or if a mortgage does not correspond with the note which it was intended to secure, it is apparent that the inconsistency must have occurred through some mistake or accident. It is certainly not to be supposed that the parties have understandingly intended to execute and deliver, as parts of the same transaction, papers which are inconsistent with themselves; and if it appears that they have done so, it is natural and reasonable to infer that one of the papers was so executed and delivered by mistake. In such case, *it not being apparent on the face of the papers which one expresses the real intention and agreement of the parties, there is no good reason why extrinsic evidence should not be received in a court of law to show the fact.* Each paper may be put in evidence as an admission or declaration of whatever is therein contained. An argument may also be drawn from the circumstances of any particular case that one of the papers would be more likely to express the true meaning of the parties than the other. But there is no legal presumption to that effect. There being then two inconsistent writings, both admissible as evidence of the transaction to which both relate, and there being no legal presumption in favor of either, but it being a question of fact which correctly represents the agreement of the parties, we should be slow to admit that a court of law, encountering such a state of facts, would be powerless to deal with it, and unable to consider other evidence to show which paper was delivered understandingly, and which through mistake. On the contrary,

we are of opinion that, on the trial of the action at law, it would be entirely competent for the present defendants, on the one hand, to show by extrinsic evidence that the notes expressed the real understanding and agreement of the parties, or for the present plaintiffs, on the other hand, to show in like manner that the mortgage expressed such understanding and agreement.

"The decision of this court, when the action at law was before it on exceptions, was entirely consistent with this view. The presiding judge at the trial had ruled, as matter of law, that, by the terms of the mortgage, the debt secured thereby was $30,000 and interest, and that it was not competent for the present defendants to prove that the notes constituted the entire mortgage debt, and that no other debt or claim existed or was intended to be secured than the notes without interest, and that the present plaintiffs had no right or claim to recover interest upon the notes, or in any way. This ruling was reversed by this court, and it was held that the mortgage was not conclusive as to the amount of the mortgage debt, that the notes might also be looked at, and that it might be shown by evidence that they expressed the true amount of indebtedness. That decision does not hold, and does not imply, that it would not be competent for the present plaintiffs to meet that evidence by showing that in fact the mortgage expressed the true amount of indebtedness. There is no intimation that the notes are the exclusive evidence for this purpose.[1]

"Nor is there anything in former decisions of this court which upholds that view. It has indeed often been held, in this State and elsewhere, that where there is some lack of conformity between a mortgage and the note which it was intended to secure, parol evidence is admissible to identify the note.[2] So, on the other hand, it has been held that a mortgage is *prima facie* evidence of the existence of a debt corresponding with that described therein, and that the note

[1] Hampton Cotton Mills *v.* Payson, 130 Mass. 88.

[2] Goddard *v.* Sawyer, 9 Allen (Mass.), 78, 80; Baxter *v.* McIntire, 13 Gray (Mass.), 168; Hough *v.* Bailey, 32 Conn. 288.

is not the only evidence of the debt secured.[1] So where a mortgage was given to secure two notes "for the sum of $500," and the notes, being produced and identified, were for $500 each, it was held that it might be shown by the notes and other evidence that they correctly represented the indebtedness secured by the mortgage.[2] So where a person had guaranteed a note for $256, and took for his indemnity a mortgage which erroneously described the note as for $236, and his title as mortgagee was questioned by an attaching officer, on the ground that the mortgage was either fraudulent at the outset or had been discharged, it was held competent for him to produce the note, with evidence of its identity as the liability intended to be secured, for the purpose of showing that there was a real liability which had not been extinguished. It was entirely immaterial to ascertain whether the amount due was $236 or $256. The holder of the note was no party to the action.[3] So in a case where there was no inconsistency between the phraseology of the note and mortgage, it was held that the legal incident of three days' grace which attached to the note should be assumed to have been contemplated by the parties as incident to the mortgage debt, and that therefore a writ of entry to foreclose the mortgage for breach of condition could not properly be brought till after the expiration of the days of grace; and that in such case, there being but one promise to pay money, and there being no doubt as to the phraseology in which that promise was expressed, the note was the legitimate evidence of the promise.[4] There is nothing in any of these cases to show, or to imply, that the note will, as matter of law, be deemed to be the exclusive evidence of the mortgage debt, in a case where the note and mortgage are partially inconsistent with each other. In such case there is no presumption one way or the other, but the question is to be determined as a matter of fact."

A written contract, though *bona fide* between those who

[1] Smith *v.* Johns, 3 Gray (Mass.), 517.

[2] Crafts *v.* Crafts, 13 Gray (Mass.), 360.

[3] Johns *v.* Church, 12 Pick. (Mass.) 507; 23 Am. Dec. 651.

[4] Coffin *v.* Loring, 5 Allen (Mass.), 153.

made it and are parties to it, may operate as a fraud upon third parties; and in such cases parol evidence may be introduced in a suit between such third party and a party to the contract, though varying the writing, to show what was the truth in regard to the transactions. The rule that parol evidence will not be received to vary, explain or control a written instrument is confined entirely to actions between the parties thereto, or their privies in interest. In actions between strangers thereto, the *real* facts may be shown, or any fact that changes the legal effect of the contract, or shows the real intention, object or purpose of the contract; and this is the rule also in cases where the contract is offered in evidence in an action between a stranger to the contract and one of the parties thereto;[1] nor does it apply in actions between the sureties, as they are not regarded as estopped, by the provisions of the contract, from showing any agreement between themselves, or the party for whom they became surety. The rule is confined exclusively to the parties actually contracting as principals.[2]

Therefore a written instrument may be contradicted by the party making it, when offered in evidence in a suit to which a stranger to the instrument is a party.[3]

So in a suit between a party to a written contract and a stranger to it, neither party is concluded by the terms of the writing, but either may show by parol that the contract was otherwise than the writing shows.[4]

The rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, is applied

[1] Barreda *v.* Silsbee, 21 How. (U. S.) 146; Blake *v.* Hall, 19 La. An. 49; Woodman *v.* Eastman, 10 N. H. 359; Edgerly *v.* Emerson, 23 N. H. 555; Farbush *v.* Goodwin, 25 N. H. 425; New Berlin *v.* Norwich, 10 Johns. (N. Y.) 229; Reynolds *v.* Magness, 2 Ired. (N. C.) L. 26; Hughes *v.* Sandal, 25 Tex. 162; Venable *v.* Thompson, 11 Ala. 147; Stradder *v.* Lambeth, 7 B. Monr. (Ky.) 589; Van Eman *v.* Starchfield, 10 Minn. 255; Thomas *v.* Truscott, 53 Barb. (N. Y.) 200; Woodman *v.* Eastman, 10 N. H. 359; Hughes *v.* Sandall, 25 Tex. 162; Bareda *v.* Silsbee, 21 How. (U. S.) 146; Blake *v.* Hall, 19 La. Ann. 49; Forbush *v.* Goodwin, 25 N. H. 425; Reynolds *v.* Magness, 2 Ired. (N. C.) 26.

[2] Thomas *v.* Truscott, *ante.*

[3] Venable *v.* Thompson, 11 Ala. 147.

[4] Stradder *v.* Lambeth, 7 B. Mon. (Ky.) 589.

only in suits between the parties to the instrument and their privies in interest,[1] and does not apply to cases arising between sureties; it is limited to the stipulations between the parties actually contracting with each other by the written instrument.[2]

Sec. 35. Judicial Records.

Judicial records import absolute verity on their face, and cannot be impeached by parol,[3] and all the questions relating to the time when it was, in fact, made, on what authority made, and whether its recitals are true or not, must be settled by reference to the record alone.[4] But when the precise hour of the day upon which a judgment was entered becomes important, and the record is silent upon that point, it may be shown by parol.[5] So where the record is silent as to the precise claim upon which the judgment was predicated, it may be shown by reference to the pleadings or by parol, as to identify the note on which it was rendered.[6] The parties to a judgment may be identified by parol;[7] and where proceedings are brought to correct a mistake in a judgment, evidence is admissible outside of the judgment to show the mistake.[8] Indeed, upon grounds of public policy, and that there may be an end to disputes, judicial records are held conclusive *as to the facts stated therein* as to the parties and their privies, and are a bar to all inquiry as to the truth or falsity of the facts stated therein.[9] In general, a judg-

[1] Van Eman *v.* Stanchfield, 10 Minn. 255.

[2] Thomas *v.* Truscott, 53 Barb. (N. Y.) 200.

[3] Murrah *v.* State, 51 Miss. 652; Driggs *v.* Morgan, 2 La. An. 151; Taylor *v.* Jones, 3 id. 619.

[4] Herrington *v.* McCollom, 73 Ill. 476. Its date cannot be contradicted by parol. Wiley *v.* Southerland, 41 Ill. 25.

[5] In Lansing *v.* Pawson, 38 Penn. St. 480, it was held that in an issue as to whether a judgment upon warrant of attorney was entered before the death of the defendant therein, it was not error to admit the testimony of the clerk who entered the judgment, that it could not have been entered earlier than eight o'clock in the morning.

[6] Hampton *v.* Dean, 4 Tex. 455; Parker *v.* Thompson, 3 Pick. (Mass.) 429.

[7] Root *v.* Fellows, 6 Cush. (Mass.) 29.

[8] Jenkins *v.* Long, 23 Ind. 460.

[9] Aldridge *v.* Haines, 2 B. & Ad. 408.

ment *inter partes* will bind only the parties and their privies, but a judgment *in rem* is binding upon all the world, even though it is not pleaded.[1]

Sec. 36. Assignments.

Where property or choses in action are assigned by an instrument in writing, which upon its face purports to embrace the entire contract, it is subject, at law, to the general rule that parol evidence is not admissible to vary or contradict it,[2] but in equity such evidence is admissible to show that, although absolute in form, it is not so in fact,[3] as that an assignment of a mortgage to one person by name, was in fact intended for the benefit of another, as well as himself.[4] The real consideration of an assignment may be shown, even though the effect is to show the object of the assignment.[5] So fraud may be shown;[6] so, too, parol evidence may be given to show and correct a merely clerical error therein, as in making up the schedule when a note or demand is misdescribed, for the purpose of identifying the note or demand and fixing the true amount, evidence of the mistake may be shown:[7] and if the assignment is general on its face and admitted to be for a different purpose, parol evidence of the intent of the parties may be given.[8] Evidence is not admissible to show that other property than that named in the agreement was intended to have been embraced therein;[9] nor can it be shown that an assignment of a mortgage was intended to be a discharge except for the purpose of prov-

[1] Hannsford *v.* Hunn, 2 C. & P. 155; Magrath *v.* Hardy, 4 Bing. N. C. 796.

[2] Osgood *v.* Davis, 18 Me. 146; Durgin *v.* Ireland, 14 N. Y. 822.

[3] Rhodas *v.* Farmer, 17 How. (U. S.) 464.

[4] Laeket *v.* Child, 11 Ala. 640; Brown *v.* Isbel, 11 id. 109. But see Aldrich *v.* Hapgood, 39 Vt. 617, where it was held that where an assignment was made ostensibly for the benefit of *three* persons, it could not be shown to have really been intended for the benefit of only one of the assignees.

[5] Lockwood v. Canfield, 20 Cal. 126; Galwey's Appeal, 34 Penn. St. 242.

[6] Russell *v.* Tuttle, 2 Root (Conn.), 22.

[7] Marsh *v.* Mandeville, 28 Miss. 122; Platt *v.* Hyde, 8 Iowa, 386.

[8] Moses *v.* Murgatroyd, 1 John. Ch. (N. Y.) 119.

[9] Driscoll *v.* Fiske, 21 Pick. (Mass.) 503; Taylor *v.* Sayre, 24 N. J. L. 647.

ing fraud ;[1] or that an assignment of stock under seal, which is absolute on its face, was intended as a mortgage ;[2] or that, at the time when an assignment of stock was made, the assignor promised to make a good and effectual title thereto.[3]

Sec. 37. Bills of Lading.

Bills of lading are regarded as of a dual nature, being both receipts and contracts, and, so far as they partake of the nature of the receipts, parol evidence is admissible to explain or vary them, as, to that extent, they are only regarded as *prima facie* evidence.[4] But, so far as the bill expresses the actual contract between the carrier and shipper, parol evidence is not admissible to alter, vary or explain it.[5]

Thus it is held that a bill of lading or railroad receipt which states that the goods are received in good order, is to that extent only a receipt, and does not estop the carrier from showing that the goods were really in a damaged condition. But such proof must be confined to defects not known to the carrier when the receipt was given.[6]

So to show an error or mistake as to the quantity of goods.[7] So, where it is signed by an agent to show who the principal is.[8] But representations made by the carrier before the bill of lading was executed, as to the depth of water at the place of landing, cannot be given in evidence by him to

[1] Hamand *v.* Howard, 3 Met. (Mass.) 548.

[2] Bond *v.* Susquehanna Co , 6 H. & J (Md.) 128. But this only applies in those States wherein the old distinction as to instruments under seal is preserved.

[3] Osgood *v.* Davis, 18 Me. 146.

[4] Steamboat Missouri *v.* Webb, 9 Mo. 193; Sutton *v.* Kettell, 1 Sprague (U. S C. C.), 309; The Tusket, id. 71; Great Western R. R. Co. *v.* McDonald, 18 Ill. 172; Hendricks *v.* Steamer Morning Star, 18 La. An. 353; Baltimore, &c., Steamboat Co. *v.* Browne, 54 Penn. St. 77; O'Brien *v.* Gilchrist, 34 Me. 554; Atwell *v.* Miller, 11 Md. 348; Graves *v.* Harwood, 9 Barb. (N. Y.) 77; McTyer *v.* Steele, 26 Ala 487; Wolfe *v.* Myers, 3 Sandf. (N. Y.) 7.

[5] McTyer *v.* Steele, *ante;* Steamboat Missouri *v.* Webb, 9 Mo. 193; Cheeny *v.* Holly, 14 Wend. (N. Y.) 26; Jones *v.* Warner, 11 Conn. 40; Cox *v.* Paterson, 30 Ala. 608; Arnold *v.* Jones, 26 Tex. 335; Shaw *v.* Gardner, 12 Gray (Mass.), 488; Gardner *v.* Chase, 2 R. I. 112; White *v.* Van Kirk, 25 Barb. (N. Y.) 16

[6] Blade *v.* Chicago, &c., R. R. Co., 10 Wis. 4.

[7] Graves *v* Howard, 9 Barb. (N. Y.) 477.

[8] Goddard *v.* Mullany, 52 Barb. (N. Y.) 87.

excuse his liability for a loss of the goods or injury thereto ;[1] nor that an additional quantity of goods should be carried ;[2] or that the rate of transportation was to be dependent upon the price obtained for the goods ;[3] nor indeed in *any* case where the effect of the evidence is to vary the terms of the contract as expressed in the bill.[4] But a bill of lading may be varied by a subsequent parol agreement, and such supplemental contract may be shown by parol evidence.[5]

Sec. 38. Bills of Sale.

Bills of sale, absolute upon their face, cannot be shown by parol to be in fact only intended as collateral security, particularly where the right of third persons will be affected by such proof.[6] But in order to exclude such proof, they must express a contract ; a mere bill of goods, as that A. bought of B. certain articles at a certain price, "six per cent off for cash," is not a contract, and is open to parol proof to show any fact connected with and material to the transaction.[7] Where, however. the bill of sale is in the nature of a contract, it is, like all other contracts, presumed to embody all that was agreed upon between the parties, and is not open to explanation by parol, but is subject to the same rules in this respect as other contracts. Thus, where a sale of property, reduced to writing, contains all the elements requisite to show a contract between the parties, but contains no warranty of the goods, parol proof is not, in the absence of fraud, admissible to show a warranty in fact.[8] So where a business, with all the good will belonging thereto, is

[1] Shaw *v.* Gardner, 12 Gray (Mass.), 488.

[2] Sayward *v.* Stevens, 3 id. 97.

[3] Gardner *v.* Chase, 2 R. I. 112.

[4] Arnold *v.* Jones, 26 Tex. 335 ; White *v.* Van Kirk, 25 Barb. (N. Y.) 16.

[5] Atwell *v.* Miller, 11 Md. 348.

[6] Sanborn *v.* Chittenden, 27 Vt. 171 ; Champlin *v.* Butler, 18 John. (N. Y.) 169 ; Hazard *v.* Loring, 10 Cush. (Mass.) 269 ; Hayward *v.* Wallace, 4 Strobh. (S. C.) 181.

[7] Linsley *v.* Lovely, 26 Vt. 123 ; Silliman *v.* Tuttle, 45 Barb. (N. Y.) 171 ; Filking *v.* Whyland, 24 N. Y. 338 ; Dana *v* Fiedler, 12 id. 40 ; Wentworth *v.* Buhler, 3 E. D. S. (N. Y. C. P.) 305.

[8] Houghton *v.* Carpenter, 40 Vt. 588 ; Jolliffe *v.* Collins, 21 Mo. 338 ; Heyward *v.* Wallace, 4 Strobh. (S. C.) 181 ; Pickard *v.* McCormick, 11 Mich. 68.

conveyed by a bill of sale, parol proof is not admissible to show that the vendor agreed not to establish a similar business in the town ;[1] or to show that a bill of sale was merely intended as a trust ;[2] or that it was merely intended as an assignment ;[3] or that a sale was made by two persons when the bill of sale was only executed by one ;[4] or that it was given merely to enable the vendee to get possession of the property as agent of the vendor ;[5] or that it was intended to embrace other property than that named therein ;[6] or that property within its provisions was in fact excepted ;[7] nor to show that the title and possession of the property was not to vest in the vendee immediately ;[8] nor in fact to vary in any respect the terms or conditions of the sale.[9] But it must be remembered that, in order to exclude such proof, the bill of sale must contain all the essential elements of a contract, leaving nothing open to parol proof. As to whether it is a contract which the courts can reasonably construe, is a question for the court.[10]

Sec. 39. Leases.

It is not competent to show by parol that certain other premises were intended to be included in a lease ; or that certain premises named therein were intended to have been excluded ;[11] or that more or less rent was agreed upon ;

[1] Smith *v.* Gibbs, 44 N. H. 335.

[2] Owen *v.* Sharp, 12 Leigh (Va.), 427 ; Trumbo *v.* Cartwright, A. K. Marsh. (Ky.) 532.

[3] Frasier *v.* Sneath, 3 Nev. 120.

[4] Wren *v.* Wardlaw, Minor (Ala.), 363.

[5] McClenney *v.* Floyd, 10 Tex. 150.

[6] McCloskey *v.* McCormick, 37 Ill. 66.

[7] Harrell *v.* Dorrance, 9 Fla. 490.

[8] Rennell *v.* Kimball, 5 Allen (Mass.), 356.

[9] Peaslee *v.* Stafford, 1 N. Chip. (Vt.) 173 ; Davis *v.* Moody, 15 Ga. 175.

[10] Houghton *v.* Carpenter, 40 Vt. 588 ; Pickard *v.* McCormick, 11 Mich. 68 ; Linsley *v.* Lovely, 26 Vt. 123.

[11] Barton *v.* Dawes, 10 C. B. 261 ; Meres *v.* Ansell, 3 Wils. 275 ; Norton *v.* Webster, 12 Ad. & El. 442 ; Hope *v.* Atkins, 1 Price, 143. Where the lease contains no warranty, express or implied, that the premises are fit for occupation, it is not competent to show that the landlord represented them to be so. Dutton *v.* Gerrish, 9 Cush. (Mass.) 89. Where an assignment of a lease is made in writing, it is not competent to show that the assignee agreed to pay the accrued rent. Graves *v.* Porter. 11 Barb. (N. Y.) 192. Where a lease abrogates a previous writ-

or that it was to be apportioned;[1] or that it was to be paid at a different time from that named in the lease;[2] or that the lease was to commence at a later date;[3] or that the tenant was to pay the taxes, etc.;[4] or that other rights and privileges than those named in the lease were given;[5]

ten agreement, it is not competent to show that it was not intended to have that effect. Tibbetts *v.* Percy, 24 Barb. (N. Y.) 39. Under a lease of coal mines, containing no stipulation as to the quantity of coal to be mined, but fixing a certain sum per bushel as the rent to be paid, parol evidence is not admissible to show that the lessee agreed to mine any particular quantity, or even all that he could. Lyon *v.* Miller, 24 Penn., St. 392. When a party seeks to enforce a written contract, although the defendant cannot introduce parol evidence to alter or vary it, yet, if the plaintiff introduces evidence as to a contract not embraced in the writing, the defendant is at liberty to introduce evidence of a different contract for the purpose of contradicting the plaintiff's evidence, although it has the effect to vary the terms of the written contract. Arbeiter *v.* Day, 38 Conn. 155. Where there is no latent ambiguity, parol evidence is not admissible. Thus, where lands leased were bounded on the north line of a town, parol evidence was held inadmissible to show that a different line had been understood by the parties to be the true boundary. So where a lease was in writing, and there were only *two* exceptions therein, it was held that it could not be shown by parol that the lessor *intended* to make still another, Haney *v.* Newton, 7 Pick. (Mass.) 29; and generally it may be said that parol evidence is not admissible to prove an agreement that directly contradicts the lease, Jungerman *v.* Bovee, 19 Cal. 354; Carpenter *v.* Shanklin, 7 Blackf. (Ind.) 308; or that it was intended to have a different effect from that which it purports to have, as, that it was intended as a mortgage, Stewart *v.* Murray, 13 Minn. 426; or that it was understood that the lessee might occupy the premises for *any* purpose, when the use was specially restricted in the lease. Sientes *v.* Odier, 17 La. An. 153.

[1] Flinn *v.* Calow, 1 M. & G. 589; Preston *v.* Merceau, 2 W. Bl. 1249. But if no rent is named in the lease, parol evidence is admissible to show what rent was agreed upon. King *v.* Woodruff, 23 Conn. 56.

[2] Thus, in Carpenter *v.* Shanklin, 7 Blackf. (Ind.) 308, by lease of real estate executed by the lessor and lessee, under their seals, for one year, the time fixed for the payment of the last half year's rent was February 1, 1841. It was held, that parol evidence that the said rent was not due until March 1, 1841, was inadmissible; also, that the landlord, in such case, had a preference for said rent over an execution levied February 1, 1841, on the tenant's goods.

[3] Henson *v.* Cooper, 3 Scott's N. R. 48.

[4] Rich *v.* Jackson, 4 Br. P. C. C. 514, cited and reported in full in note *c*, 6 Ves. 334.

[5] Jungerman *v.* Bovee, 19 Cal. 354; Sientes *v.* Odier, 17 La. An. 153. But where the lease provides that he shall hold the lease subject to "manor regulations," or "municipal regulations," etc., the lessee

or that the landlord agreed to repair the premises;[1] or, indeed, where the lease is explicit, is parol evidence even admissible to aid in its construction.[2] But as previously stated, there are exceptions to the rule, and in addition to those exceptions it may be said that parol evidence is always admissible to defeat the lease, as, to show that it was made for an illegal purpose,[3] or that certain formalities required by law were not observed;[4] or, indeed, fraud or anything that tends to show that the deed is void in law may be shown.[5] So, too, it is competent to show by parol evidence

may show by parol what such regulations are. Dorsey *v.* Eagle, 7 G. & J. (Md.) 321. Where certain specific exceptions are made in a lease, it cannot be shown by parol that other exceptions were agreed upon. Hovey *v.* Newton, 7 Pick. (Mass.) 29.

[1] Mayer *v.* Muller, 1 Hilt. (N. Y. C. P.) 491; Post *v.* Vetter, 2 E. D. S. (N. Y. C. P.) 248; New York *v.* Price, 5 Sandf. (N. Y. Supr. Ct.) 542. In Howard *v.* Thomas, 22 Ohio St. 201, the plaintiff and defendant executed a written agreement for the lease of a house for the term of one year, at the rent of $100. In an action by the plaintiff against the defendant for not repairing the roof of the house, the plaintiff offered to prove, by parol, that, at the time of the execution of the written agreement, he refused to sign it, unless the defendant would promise to repair the roof of the house; and thereupon the defendant promised to do so, and he, the plaintiff, in consideration of such promise, signed the written agreement. It was held, that such evidence was inadmissible.

[2] 2 Best on Evidence (Wood's ed.), note, page 888.

[3] Doe *v.* Allen, 8 T. R. 148; Rex *v.* Northwingfield, 1 B. & Ad. 912; Lightfoot *v.* Tenant, 1 B. & P. 555. Where fraud or illegality are averred, parol evidence is always admissible to establish it, whatever may be its effect upon the contract. Thus, it may be shown that a material part of the contract has been inserted or altered by the fraud of the other party, Baltimore Steamboat Co. *v.* Brown, 54 Penn. St. 77; Pierce *v.* Wilson, 34 Ala. 596; Townsend *v.* Cowler, 31 id. 428; Hunter *v.* Biglyon, 30 Ill. 228; Hamilton *v.* Congers, 28 Ga. 276; Sanford *v.* Handy, 23 Wend. (N. Y.) 126; Akin *v.* Drummond, 2 La. An. 92; Gatting *v.* Newell, 9 Ind. 572; Davis *v.* Stern, 15 La. An. 177; Bartle *v.* Vosburg, 2 Grant's Cas. (Penn.) 277; Selden *v.* Myers, 20 How. (U. S.) 506; or that the other party by fraud has prevented the reduction of the whole contract to writing. Phyfe *v.* Wardwell, 2 Edw. Ch. (N. Y.) 47; Elliott *v.* Conwell, 13 Miss. 91; Wesley *v.* Thomas, 6 H. & J. (Md.) 24; Kennedy *v.* Kennedy, 2 Ala. 571; Chetwood *v.* Britain, 2 N. J. Eq. 438; Sull *v.* Cass, 43 N. H. 62; Martineau *v.* May, 18 Wis. 54. As to proof of illegality, see Lazare *v.* Jacques, 15 La. An. 599; Corbin *v.* Sistrunk, 19 Ala. 203.

[4] Kelfe *v.* Ambrosse, 7 T. R. 551.

[5] Goodwin *v.* Hubbard, 15 Mass. 219; Boyer *v.* Grundy, 3 Pet. (U. S.) 219; Russell *v.* Rogers, 15 Wend. (N. Y.) 351; Prentiss *v.* Russ, 16

to what premises the lease applies, when, although the lease upon its face is clearly enough expressed, yet an ambiguity arises from extrinsic circumstances. Thus, where the lease is of "The Lanier House," it is competent to show what premises are connected and used with it, and what extent of building and grounds are included under the expression, and testimony as to what was ordinarily meant in that locality by the words is admissible;[1] or what premises are understood to be embraced in the words "my home farm," or any other *general* description of premises.[2] Thus, a building misdescribed as number 38, may be shown in fact to mean number 35;[3] especially would this be so, if it was

Me. 30; Wren *v.* Woodrow, 1 Ala. 363. Where fraud is alleged, any consideration or fact, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction, Roscoe's Ev. (13th ed.) 22; Paxton *v.* Popham, 9 East, 421; for fraud is an extrinsic and collateral matter that avoids all transactions, and the same is true as to illegality. Chandler *v.* Ford, 3 Ad. & El. 649; Collins *v.* Blantern, 2 Smith's S. C., *notes*.

[1] Harris *v.* Dub, 57 Ga. 77; Sargent *v.* Adams, 3 Gray (Mass.), 72.

[2] Hutchins *v.* Scott, 2 M. & W. 816; Hutchins *v.* Groom, 5 C. B. 515. Where there was an agreement in writing to lease for a term of years "The Adams House, situate on Washington street, Boston," it was held that it might be proved by parol to have been intended by the parties to include only so much of the building as was fitted up as a hotel, by the name of the Adams House, and not the separate shops which occupied the whole of the ground floor, except the entrance to the hotel. Sargent *v.* Adams, 3 Gray (Mass.), 72. Whether certain premises are or are not embraced in the lease, when the lease does not explicitly describe them, is always open to parol proof. Crawford *v.* Morris, 5 Gratt. (Va.) 90; Guy *v.* Barnes, 29 Ind. 103; Corbett *v.* Costello, 8 La. An. 427; D'Aquin *v.* Barbour, 4 id. 441. In Chamberlain *v.* Letson, 5 N. J. L. 152, the lease demised a "house and lot containing three acres, more or less." The lessee claimed *seven* acres, the whole being in one lot not separated by a fence. Parol evidence was admitted to show that the original lot connected with the house was about three acres; that the lessor added about four acres by purchase, and occupied the whole at the time of the demise, and that the lease was intended by the parties to cover only the original three acres, visible remains of the old original line being still visible. A call in a grant for a line beginning at the "north corner of R.'s store," where the store stands squarely east and west and has *two* north corners, is a latent ambiguity, and may be explained by parol proof. Lawrence *v.* Hyman, 79 N. C. 209.

[3] Hutchins *v.* Scott, *ante*. And even though such a lease was void to create any interest, if the tenant went into possession of the premises

shown that the lessor owned number 35, and did not own number 38, and that the tenant had gone into possession of 35 under the lease. But if the landlord owned both, and there was nothing in the lease to indicate that 35 instead of 38 was intended, and the tenant had not gone into possession under the lease, it would not be competent in a court of law to show that 35 was intended. Where a grant is in general terms, the addition of particular terms operates as a restriction and limitation upon the grant. Thus, if a lease is of "the premises on the corner of College and Centre street," the whole of the premises there situated owned by the lessor will pass; but if, in addition thereto, the words "recently occupied by E. Laporte as a French hotel" are added, the latter clause limits the grant to such part of the premises as were occupied by E. Laporte for a French hotel, and no more and no less will pass. Therefore, the extent of the grant being rendered uncertain by such restrictive clause, parol evidence is admissible to show what part of the premises was occupied by E. Laporte for a French hotel, and thus to define the extent of the demise.[1]

intended, it would be admissible to prove the terms of the tenancy. Bealand *v.* Hurst, 3 Starkie, 60.

[1] Alger *v.* Kennedy, 49 Vt. 109; 24 Am. Rep. 117. See also Nutting *v.* Herbert, 35 N. H. 125. In Conolly *v.* Vernon, 5 East, 51, the rule was thus stated: "Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant; but where a grant is in *general* terms, there the addition of a *particular* circumstance will operate by way of restriction and modification of such grant. Therefore, where one having customary tenements, *compounded and uncompounded*, surrendered to the use of his will '*all and singular the lands, tenements, etc., whatsoever, in the manor, which he held of the lord by copy of court roll*, in whose tenure or occupation soever the same were, *being of the yearly rent to the lord in the whole of* 4*l.* 10*s.* 8½*d.*, *and compounded for*.' Held, that the words '*and compounded for*,' restrained the operation of the surrender to that description of copyholds then belonging to the surrenderer; and that the words '*being of the yearly rent, etc., of* 4*l.* 10*s.* 8½*d.*,' which were not referable to any actual amount of his rents, either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction." See also, to the same effect, Bell *v.* Sawyer, 32 N. H. 72; Tenny *v.* Beard, 5 id. 58; Hibbard *v.* Hurlburt, 10 Vt. 173; Sargent *v.* Adams, 3 Gray (Mass.), 72; Mitchell *v.*

But, if the description of the premises of itself affords ample means of ascertaining or defining the premises intended to pass, it is not competent to show by parol that the lease was intended to apply to other premises, even though there are errors or inconsistencies,[1] and the actual intention of the parties is in opposition to the strict letter of the lease.[2]

Where the language of a lease is illegible from age or other causes, and the construction is doubtful from antiquity, parol evidence is admissible to show what its provisions are, as well as to aid in its construction in any doubtful matter.[3] So parol evidence is admissible to explain a latent ambiguity in a deed or lease. It is a rule of construction that in order to arrive at the real intention of the parties, and to make a correct application of the words and language of the contract to the subject-matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. "The law does not deny to the

Stevens, 1 Aik. (Vt.) 161; Putnam *v.* Smith, 4 Vt. 622. In Freeland *v.* Burt, 1 T. R. 701, the demise was of certain premises in Westminster "late in the occupation of A.," particularly describing them, was held to extend only to such part of the premises as A. occupied, and a cellar under yard belonging to the premises, which was in the possession of another tenant, was held not embraced in the grant; and in ejectment for the premises, it was held that the landlord might show what part of the premises A. occupied, and that the cellar did not pass under the grant. In Jackson *v.* Perine, 35 N. J. L. 137, the court laid down the rule, that where the language of the grant admits of but one construction, and the location of the premises intended to be conveyed is already ascertained by a description in the deed, either by courses and distances or monuments, no other exposition derived either from the language or acts of the parties is admissible; but, *where the language is equivocal, and the location of the premises is made doubtful, either by the insufficiency of the description or the inconsistency of two or more parts of the description*, the construction put upon the grant by the parties in locating the premises may be resorted to. See also McLaughlin *v.* Bishop, 35 id. 512; Thomson *v.* Wilcox, 7 Lans. (N. Y.) 376.

[1] Vose *v.* Bradstreet, 27 Me. 156; Norwood *v.* Byrd, 1 Rich. (S. C.) 135; Phillips *v.* Castley, 40 Ala. 486; Todd *v.* Philhamer, 24 N. J. L. 796; McLaughlin *v.* Bishop, 35 N. J. L. 512; Eggleston *v.* Bradford, 10 Ohio, 312; Campbell *v.* Johnson, 44 Mo. 247; Bratton *v.* Clawson, 3 Strobh. (S. C.) 135.

[2] Tracy *v.* Albany Ex. Co., 7 N. Y. 474.

[3] Best on Evidence, 198, *n. a.*

reader the same light and information that the writer enjoyed; he may acquaint himself with the persons and circumstances that are the subjects of the allusions and statements in the written agreement, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described."[1] A lease had been made by the plaintiff to the defendant, of part of a messuage, together with a piece of ground thereunto adjoining. This piece of ground was used as a yard, and beneath the surface thereof was a cellar, occupied by a third party under a lease previously granted to him by the plaintiff. The occupant of the cellar continued to reside in it, and to pay rent to the plaintiff for three or four years after the latter had demised the yard to the defendant, but his lease having expired, and he having quitted the cellar, the defendant took possession of it, contending that the cellar had passed to him by the demise of the yard, upon the maxim of the common law, "*Cujus est solum, ejus est usque ad cœlum et ad inferos*," and that the plaintiff was estopped from introducing parol evidence to control or qualify the operation of the lease; but the court held that parol evidence of the surrounding circumstances might properly be brought in aid of the construction and interpretation of the lease. "The only question," observes ASHURST, J., "is whether the court are absolutely bound by the terms of this lease to put the construction upon it for which the defendant contends. *Prima facie*, indeed, the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances, and it seems to me that the construction of all deeds must be made with reference to their subject-matter, and it may be necessary to put a different construction upon leases made in populous cities from that on those made in the country; we know that in London different persons have several freeholds over the same spot, and that different parts of the same house are let out to different people."[2]

[1] Shore *v.* Wilson, 9 Cl. & Fin. 575, 569.

[2] Freeland *v.* Burt, 1 T. R. 703; Press *v.* Parker, 10 Moore, 158;

From the admission of such evidence, and from bringing the words of the written instrument into contact with surrounding circumstances, a doubt sometimes arises as to the correct application of the language and words used to the subject-matter of the contract and the objects professed to be described; this is called a *latent ambiguity*, because it is not apparent upon the face of the contract, but arises from the application of the words to the objects to which they refer. "As this difficulty or ambiguity is introduced solely by the admission of extrinsic evidence of surrounding circumstances, it may be rebutted and removed by the production of further evidence of the identity of the objects described, in accordance with the ancient maxim, '*Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*'" [1] This may be illustrated and exemplified by a case analogous to the one mentioned by Pothier. "You rent of me an apartment in a house, the remainder of which is occupied by myself. I make you a new lease in these terms: 'I agree to let, and A. B. agrees to occupy my house in Frederick street, for the term of two years from the date hereof, at the annual rent of 20*l.*' Any one on reading this agreement would imagine that the whole house was intended to be demised, but when evidence of extrinsic circumstances is admitted, for the purpose of applying the language of the contract to the subject-matter thereof, a doubt at once arises, whether it was intended that you should have the whole house or the mere apartment which you had previously occupied; and this doubt, which is suggested purely by extrinsic evidence of the relative situations and circumstances of the parties at the time of the making of the contract, may be removed by parol evidence of other circumstances calculated to explain the sense in which the words were used, and to give them a correct application." The written instrument may also, on the face of it, be perfectly intelligible, and free from all doubt and obscurity, but from some of the circumstances

Wigram, 39, 58 (2d ed.); 20 Law J. Q. B. 67.

[1] TINDAL, C. J., Miller *v.* Travers, 1 M. & Sc. 345; Bac. Max. 23.

admitted in proof, an ambiguity arises, as to which of two or more things, or which of two or more persons, each answering the words of the writing, the parties intended to designate. There may, for example, be two estates, or two persons of the same name and description, and the words may equally apply to either. This doubt or difficulty, which has been created by parol evidence, may be removed by further evidence of a like character, calculated to explain which of the estates or persons is embraced by the description in the written instrument.[1] But the evidence,

[1] Gord *v.* Needs, 2 M. & W. 140; Hiscocks *v.* Hiscocks, 5 M. & W. 368; Wigram, p. 86, 88. See Hammond *v.* Ridgely, 5 H. & J. (Md.) 255; Lowell *v.* Parkhurst, 4 Wend. (N. Y.) 369. In Crawford *v.* Morris, 5 Gratt. (Va.) 90, where there was a written agreement to renew a lease, it was held that parol evidence was admissible to show *that the cellar of an adjoining tenement had been occupied with the premises to which the lease applied, and was necessary for the prosecution of the tenant's business*, for the purpose of showing that it was included in the lease to be renewed. In Midlothian, &c., Co. *v* Finney, 18 Gratt. (Va.) 304, the lessor, about six months after giving a lease of certain coal mines for a term, indorsed upon the lease a lease of *adjoining* coal lands for the residue of the term, declaring it to be a part of the original lease, and after such indorsement, and before the term expired, he agreed to renew the lease. Parol evidence was held admissible to show whether or not the lands of the *indorsed* lease were intended to be embraced in the renewal. In Wing *v.* Gray, 36 Vt. 261, there was a clause in the lease as follows: The lessee "is to have all the personal property on the farm," and it was held that parol evidence was admissible to show whether it was meant that he should have the *use* of the property, or that it should be his absolutely. In a New York case the defendant C., having a lease of a store, underlet to A. the whole of the first floor excepting a portion thereof which was then partitioned off, and which consisted of the stairway, with a hatchway in front, leading to the upper stories of the building. There were two doors in the front, the one opening opposite the stairway and the other into the lower room, into which there was also access through a door in the partition. The undertenant A., with the consent of his lessor, removed the partition, agreeing to restore it when requested so to do. Afterwards, A. sold out to the plaintiff S., with whom the defendant agreed in writing that "the present lessee and occupant of the first floor of the house may continue to use and occupy the said premises as long as I hold the lease thereof." In an action brought by S. to recover damages against C. for putting up the partition, it was held that parol evidence, showing that the plaintiff took the agreement from the defendant with the knowledge of what were the rights and obligations of A., the first undertenant in the premises, was competent. Steffens *v.* Collins, 6 Bosw. (N. Y.) 223.

when introduced, must have the effect of rendering the words and language of the document certain and manifest,

Where a party granted a manor by a particular name, and had two manors of that name, parol evidence was admitted to show which of them he meant; and where there was a demise of premises in Westminster, late in the occupation of A., particularly describing them, part of which was a yard, parol evidence was received to show that a cellar situated under that yard, but which was then in the occupation of B., another tenant of the lessor, was not intended to pass. Freeland *v.* Burt, 1 T. R 701; Paddock *v.* Fradley, 1 C. & J. 90. Evidence of usage was received to show that a room which had not been occupied with a certain messuage did not pass under a demise of that messuage, together with all the rooms, chambers and appurtenances thereunto belonging. Kerslake *v.* White, 2 Stark. 508. Where a lease grants a right of way, evidence may be received of the state of the premises at the time of granting the lease, and then the judge will put a construction on the lease as to the line along which the way granted runs; but if it is uncertain on the words which of two ways is intended, parol evidence may be given to show which the grantor meant. Osborne *v.* Wise, 7 C. & P. 761. Where an expression used in a written instrument has a technical meaning, parol evidence is admissible to show that it has been used in that sense, and not its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself; therefore, where a lessee of a coal mine covenanted to get the whole of the mines "not deeper than or below the *level* of the bottom of the mine" at a particular point, it was held, that parol evidence of the understanding amongst miners was admissible to show that the word "level" had a particular technical meaning different from its ordinary signification of "horizontal line." It might be questionable whether a previous agreement between the parties for a lease of the same mine, and for which the lease in question was substituted, was also admissible in evidence for the same purpose. Clayton *v.* Gregson, 5 Ad. & El. 302; Shore *v.* Wilson, 9 Cl. & F. 365. Again, where in a lease of a rabbit warren, etc., the lessee covenanted that on the expiration of the term he would leave on the warren 10,000 rabbits, the lessor paying for them £60 per thousand, it was held, that parol evidence was admissible to show that, by the custom of the country where the lease was made, the word "thousand," as it applied to rabbits, denoted twelve hundred. Smith *v.* Wilson, 3 B. & Ad. 728. Where the lessee of a coal mine covenanted to pay a certain share of all such sums of money as the coals should sell for at the pit's mouth, evidence of the lessee's having accounted with the lessor, and paid him the share of the money produced by the sale of coals elsewhere, was not considered admissible to explain the intention of the parties. Clifton *v.* Waimsley, 5 T. R. 564; Gerrard *v.* Clifton, 7 T. R. 676. Where a lessee made an agreement for a lease, and the under-lessee contracted to erect a shop-front to the house; in ejectment for forfeiture for not erecting the shop-front, it was held, that the original lease by which a penalty was imposed, if the lessee allowed a trade to be carried on upon the premises,

and must leave no doubt as to the correct application of them, and the precise object to which they were intended to

was not admissible in evidence for the defendant to explain the meaning of the words "shop-front" in the agreement. Nash *v.* Birch, 1 M. & W. 402. Where A., being tenant to B. under a lease containing covenants, by which the former was bound to fetch seventy-five bushels of coals yearly, and deliver them at the mansion-house of the latter, and also to supply him with as much good wheat as he should want in his family at 5*s.* per bushel, it was agreed between them that the lease should be surrendered up, and a new one granted, omitting the above covenants; and a new lease was accordingly executed, and at the same time an agreement entered into whereby A. agreed with B. that he would fetch and bring to the dwelling-house of B., his heirs and assigns, seventy-five bushels of coals yearly, for twelve years (the term of the new lease), and yearly supply B., his heirs and assigns, with as much good wheat as he should want in his family at 5*s.* per bushel; it was held, upon B.'s having parted with his reversion in the farm, and also quitted the mansion-house in which he resided at the time when the agreement was made, that the agreement, being entire, must receive one uniform construction; and as it was clearly local in respect of the delivery of coals, it could not be deemed personal with respect to the wheat; and that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity. Coker *v.* Guy, 2 B. & P. 565. If there be any ambiguity or contradiction in expressing the time of the commencement of a lease, the lease shall be construed beneficially for the lessee, on the principle that every man's grant shall be taken most strongly against himself. Anon., Dyer, 261 *b*, pl. 28; Lilley *v.* Whitney, Dyer, 272 *a*; Seamen's Case, Godb. 166; Davies *v.* Williams, 1 H. Blac. 25; Shep. Touch. 88, s. 6. Where a man granted an estate for life, without saying whether it was for his own life or for that of the grantee, parol evidence was received to show what interest he had in the estate; for if he was tenant in fee, it was considered that the grantee should take an estate for his own life; but that if the grantor himself was a tenant for life only, the grantee would take an estate for the grantor's life only. Smith *v.* Earl of Jersey, 2 Brod. & B. 551; 3 Moo. 339; 7 Price, 281; 3 Bligh, 290. The express terms of a lease cannot be controlled by the custom of the country; yet if the lease be entirely silent as to the time of quitting, evidence of the custom of the country may be given to fix the time. Webb *v.* Plummer, 2 B. & Ald. 746. Although no right to an away-going crop is reserved in a lease, if there are no covenants which, either in express terms or by implication of law, *exclude* such right, the lessee may produce parol evidence to show that he is entitled to such away-going crop by the custom of the country. Caldecot *v.* Smythies, 7 C. & P. 808; Wigglesworth *v.* Dallison, 1 Doug. 201; 1 Smith L. C. 453, 460 (4th ed.); Wilkins *v.* Wood, 17 L. J. Q. B. 319; Hutton *v.* Warren, 1 M. & W. 466; Faviell *v.* Gaskoin, 7 Exch. 273; Muncey *v.* Dennis, 1 H. & M. 216; Holding *v.* Pigott, 7 Bing. 465. So evidence of custom for an away-going tenant to provide work and labor, tillage and sowing, and all materials for the same in his

refer; for parol evidence is inadmissible to ascertain and establish the intention as an independent fact. The judgment of the court in expounding a deed must be simply declaratory of what is in the deed; it has to ascertain, not what the party intended, as contradistinguished from what the words express, but what is the meaning of the words he has used.[1] And when the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, the instrument is always to be construed according to the strict, plain and common meaning of the words themselves; and evidence *dehors* for the purpose of explaining the instrument according to the surmised intention of the parties is inadmissible. But to explain a patent ambiguity, parol evidence is never admissible, whatever doubt may exist as to the intention of the parties. Thus, if a blank is left in a lease or deed, unless it can be filled from inferences drawn from the instrument itself, it must remain blank, and cannot be cured by extrinsic evidence.[2]

It may be shown that the lease was made for the benefit of a person other than the lessor, as, where a lease was made by an administrator in his own name, that it was, in fact, made for the benefit of the estate.[3] So, where no time when the lease shall commence is named therein, it is competent to show what time was fixed upon by parol;[4] or that the lease was in fact executed upon a different day from that named in the lease;[5] or that it has been surrendered;[6] or when the lessee actually took possession.[7] So it is compe-

away-going year, the landlord making him a reasonable compensation, has been received, although there was an express written agreement between the parties, but which was not *inconsistent* with such custom. Senior *v.* Armytage, Bart. Holt, 197; Hutton *v.* Warren, 1 M. & W. 466, 476.

[1] 13 Law J. N. S. (Exch.) 365.

[2] Baylis *v.* Church, 2 Atk. 239; Strode *v.* Russell, 2 Vern. 624.

[3] Russell *v.* Erwin, 41 Ala. 292.

[4] Leggett *v.* Harding, 10 Ind. 414.

[5] Hall *v.* Huffman, 32 Mo. 519; Trustees *v.* Robinson, Wright (Ohio), 436.

[6] Mairs *v.* Sparks, 5 N. J. L. 513.

[7] Den *v.* Hamilton, 12 N. J. L. 109.

tent to show, by parol, that the landlord knew the purpose for which the lessee intended to occupy the premises, unless the character of the occupancy is expressly restricted in the lease, or that the lessee knew their condition, or, in the case of a sub-tenant, that he knew the conditions of the lease under which the original tenant holds.[1] Where in a lease it is stipulated that the lessee "shall have all the personal property," it is proper to show, by parol, whether he was to have it absolutely, or only the use of it.[2]

Customary rights and incidents universally attaching to the subject-matter of the contract in the place and neighborhood where the contract was made, are impliedly annexed to the written language and terms of the contract, unless the custom is particularly and expressly excluded. Parol evidence of custom and usage, consequently, is always admissible to enable us to arrive at the real meaning of the parties who are naturally presumed to have contracted in conformity with the known and established usage. Thus, the custom of the country in regard to the claims of an outgoing tenant of a farm will prevail, although there is a lease under seal regulating the terms of the holding, but not containing stipulations as to the terms of quitting, which can exclude the custom.[3] The customary right of a tenant to the away-

[1] In Steffins *v.* Collins, 6 Bos. (N. Y. Supr. Ct.) 223, the defendant, C., having a lease of a store, underlet to A. the whole of the first floor excepting a portion thereof which was then partitioned off, and which consisted of the stairway, with a hatchway in front, leading to the upper stories of the building. There were two doors in the front, the one opening opposite the stairway and the other into the lower room, into which there was also access through a door in the partition. The undertenant, A., with the consent of his lessor, removed the partition, agreeing to restore it when requested so to do. Afterwards A. sold out to the plaintiff, S., with whom the defendant agreed in writing that "the present lessee and occupant of the first floor of the house may continue to use and occupy the said premises as long as I hold the lease thereof." In an action brought by S. to recover damages against C. for putting up the partition, it was held, that parol evidence, showing that the plaintiff took the agreement from the defendant with the knowledge of what were the rights and obligations of A., the first undertenant in the premises, was competent.

[2] Knapp *v.* Marlboro, 29 Vt. 282.

[3] Hutton *v.* Warren, 1 M. & W. 475, 476; Domat, liv. 1, tit. 1.

going crop, to compensation for work and labor, seed, and materials employed in manuring, tilling, and sowing the land, also the customary right of a landlord or reversioner to a heriot on the death of a tenant for life, and all customs and usages respecting the cultivation of the soil and the mode of husbandry, will impliedly prevail, if the lease is silent respecting them, and parol or oral evidence is, consequently, admissible to superadd the usage and customary right to the contract between the parties, such right and usage being recognized by law as incident to the subject-matter of the contract, and consequential upon the taking of the lands.[1] *But parol evidence of custom and usage is not admitted to contradict or vary express stipulations and provisions restricting or enlarging the exercise and enjoyment of the customary right.* Omissions may be supplied by the introduction of the custom, but the custom cannot prevail over and nullify the express provisions and stipulations of the contract.[2] If a lease, for example, contains an express provision as to the disposal of the away-going crop, or specifies and regulates the particular allowances that are to be made by an incoming to an outgoing tenant, the custom in respect thereof is excluded.[3]

"In all contracts," observes PARKE, B., "as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten. But the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract."[4] "The

[1] Wigglesworth *v.* Dallison, 1 Doug. 201; Wilkins *v.* Wood, 17 Law J. Q. B. 319.

[2] Clarke *v.* Roystone, 13 M. & W. 752; 14 Law J. Exch. 143; Taylor on Ev. p. 771; Blackett *v.* R. Ex. Ass. Co., 2 C. & J. 249.

[3] Roxburghe *v.* Robertson, 2 Bligh, 156; Webb *v.* Plummer, 2 B. & Ald. 746; Roberts *v.* Barker, 1 C. & M. 808.

[4] Brown *v.* Byrne, 3 Ell. & Bl. 715.

usage," observes WILDE, C. J., "is admissible for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but not to vary or contradict, either expressly or by implication, the express terms of the written instrument." Therefore, where a written memorandum of a contract for the sale of certain specified bales of wool at an ascertained price, stated that they were "to be paid for by cash in one month," it was held that the contract imported a sale upon a month's credit; that the vendor was entitled to delivery of the goods without payment of the price, and that evidence of a usage in the wool trade, that under contracts framed in similar terms, the vendors were not bound to deliver without receiving payment of the price, was inadmissible to alter the plain import of the written instrument. "We think," observes WILDE, C. J., "that the admission of the evidence would be to allow a right to be set up inconsistent with and contradictory to the terms of the contract, and to annex an incident to the subject-matter, which if not expressly is clearly impliedly excluded by the contract.[1]

Sec. 40. Parol Evidence of Usage, admissible when.

Parol evidence applying an instrument to the subject-matter, explaining expressions used in a peculiar sense and showing the circumstances existing when the contract was made, to give effect to the language used in a contract by the parties, as they understood it, is admissible and does not impugn the general rule for the reason that it does not add to or subtract from the contract, but rather enables the court to effectuate it according to the true intention of the parties.[2] It is upon this ground that evidence of a usage or custom existing in a particular trade or business or in a particular locality is permitted to be shown.[3] It is now well settled that a general usage or one which is *known* to the parties and which does not conflict with the

[1] Spartali *v.* Benecke, 10 C. B. 221.

[2] Boonnan *v.* Jackson, 12 Wend. (N. Y.) 573; Robertson *v.* French, 4 East, 135.

[3] The Schooner Reeside, 2 Sum. (U. S.) 569; Heald *v.* Cooper, 8 Me. 83; Wait *v.* Fairbanks, Brayt. (Vt.) 7; William *v.* Gilman, 3 Me. 276.

express terms of a contract, forms a part thereof as much as though written therein.[1]

The maxim "*In contractibus tacite veniunt ea quæ sunt moris et consuetudinis,*" has full application in such cases. "Experience and observation," says STORRS, J.,[2] "prove that the engagements of individuals are in fact entered into with reference to the customs and usages which prevail in the community where they are made; they therefore tacitly agree to conform to them, and so far from doing injustice by regarding such customs and usages, *it is the only mode by which justice can be attained.* The presumption is, indeed, that those who enter into contracts, intend to be governed by the general principles of law. It is, however, competent for them to renounce these principles when public policy does not forbid, and to adopt another rule of action, and the prevalence of a particular local usage on the subject, variant from those general rules, in the absence of evidence to resist it, affords a rational ground of inference that *they intended to do so.*" The injustice of a contrary doctrine may be illustrated thus: Suppose the statute provides, as is the case in many of the States, that a "barrel" shall consist of thirty-two gallons, but by the uniform *usage* of a certain trade a barrel consists of *forty-four* gallons, as in the petroleum trade, and that number of gallons *in that trade* has uniformly been given for a barrel, have not parties contracting for a *barrel* of petroleum a right to understand that they are to have forty-four gallons, precisely the same as though it had been written out in the contract, and notwithstanding the statute fixes the general standard at a less number? The

[1] Sipperley *v.* Steward, 50 Barb. (N. Y.) 62; Wheeler *v.* Newbold, 5 Duer (N. Y.), 29; Bank of Columbia *v.* Fitzhugh, 1 H. & G. (Md.) 239; Duguid *v.* Edwards, 50 Barb. (N. Y.) 288; United States *v.* Arrand, 6 Pet. (U. S.) 715; Martin *v.* Maynard, 16 N. H. 165; Sewall *v.* Gibbs, 1 Hall (N. Y.), 612; Sampson *v.* Gazzam, 6 Port. (Ala.) 123; Stultz *v.* Dickey, 5 Binn. (Penn.) 287; Mann *v.* Burch, 25 Ill. 35; Palmer *v.* Kane, 5 Wis. 265; Ludwick *v.* Ohio Ins. Co., 5 Ohio, 436; Haven *v.* Wentworth, 2 N. H. 93; Stevens *v.* Reeves, 9 Pick. (Mass.) 198; Inglebright *v.* Hammond, 19 Ohio, 337; Noble *v.* Kenoway, 1 Doug. 510; Parr *v.* Anderson, 6 East, 202; Halsey *v.* Brown, 3 Day (Conn.), 346.

[2] In Kilgore *v.* Bulkley, 14 Conn. 390.

courts justly answer in the affirmative,[1] and the same principle lies at the foundation of all the cases admitting this species of evidence. Its object and purpose is, not to permit the contract, which has been reduced to writing, to be varied in any respect, but rather to ascertain what the parties intended by their writing, and carry their intention into effect. Where a contract is entered into, the parties are presumed to deal with reference to the known general or uniform custom or usage governing the business or subject-matter to which the contract relates, unless they exclude such presumption by the terms of the agreement itself; but, to have commercial usage take the place of general law, it must have been so uniformly acquiesced in for such a length of time that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract.[2] The contract expresses what is particular to the bargain, and the usage supplies the rest.[3]

Sec. 41. Qualities of a binding Usage.

It follows, therefore, that, in order to amount to a binding usage of a trade or business, so to speak, it must be shown to be so well established, so general, so uniform and notorious that it may reasonably be presumed that the parties knew of and contracted in reference to it. Mercantile usage must be proved *by the multiplication or aggregation of a*

[1] Miller *v.* Stevens, 100 Mass. 518. See Evans *v.* Myers, 25 Penn. St. 114; Green *v.* Moffat, 22 Mo. 529, where it was held that a usage to regard 2,200 pounds as a ton instead of 2,000 pounds, as fixed by statute, is not admissible. But an examination of those cases will show that the real ground for rejecting such evidence was that it did not establish a usage which would warrant a presumption that the parties contracted in reference to it.

[2] Oldershaw *v.* Knoles, 4 Ill. App. 63; Wheeler *v* Newbald, 5 Duer (N. Y.), 29; Juggomohun Ghore *v.* Munickchund, 7 Moore Ind. App. 263; Wilcox *v.* Phillips, 1 Wall., Jr. (U. S. C. C.) 47; Leigh *v.* Hewitt, 4 East, 154; Dalby *v.* Hirst, 1 B. & B. 224; Grissell *v.* Bristowe, L. R. 46, P. 36; Greanes *v.* Legg, 2 H. & N. 210; Duncan *v.* Hell, L. R., 6 Exch. 25; Bayliffe *v.* Butterworth, 1 Exch. 429; Hodkinson *v.* Kelly, L. R., 6 Exch. 25; Taylor *v.* Stray, 2 C. B., N. S. 175; Bayly *v.* Wilkins, 7 C. B. 880; Buckle *v.* Knapp, 36 L. J. Exch. 49; Pollock *v.* Staples, 12 Q. B. 765.

[3] Myer *v.* Dresser, 16 C. B., N. S. 646; Dalton *v.* Daniels, 2 Hilt. (N. Y. C. P.) 463.

great number of instances showing a certain course of business, and a general, established understanding respecting it.[1] And it must be shown that it is *established* and not merely casual, *uniform* and not varying, *general* and not personal, *or that it was known to the parties when the contract was entered into.*[2] Where a custom or usage was set up that a class of mercantile houses in the same line of trade in New York, generally known as "six months' houses," by their general and uniform course of business, on a bill of goods containing a memorandum, "Six per cent off for cash," would understand a sale on six months' credit, without any express agreement, it was held that in order to discharge the office of exposition, and be admissible in evidence, it must be found to be the general usage of the whole of that class of houses in the city of New York, and so well established and uniformly acquiesced in, and for such a length of time, that the jury might fairly infer that it was known to the contracting parties, and made by implication a part of their contract. If such usage is not proved, it should be laid out of the case; and an offer of evidence of anything less should be excluded.[3] But in order to establish it neither antiquity nor that general notoriety essential to establish a custom need be shown. It is sufficient if it is shown to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient imported into the contract by the parties.[4] And this is the case only when the

[1] Foye *v.* Leighton, 22 N. H. 71; Knowles *v.* Dow, 22 id. 387; Burr *v.* Sickles, 17 Ark. 428; Walker *v.* Barrow, 6 Minn. 508; Saint *v.* Smith, 1 Coldw. (Tenn.) 51; Chesapeake Bank *v.* Swain, 29 Md. 483; Smith *v.* Floyd, 18 Barb. (N. Y.) 392; Mackenzie *v.* Dunlop, 3 Macq. (Sc.) H. L. Cas. 22.

[2] Wheeler *v.* Newbould, 5 Duer (N. Y.), 29; Sipperly *v.* Steward, 50 Barb. (N. Y.) 62; Martin *v.* Maynard, 16 N. H. 165; Duguid *v.* Edwards, 50 Barb. (N. Y.) 288; Wood *v.* Hicock, 2 Wend. (N. Y.) 501; Kendall *v.* Russell, 5 Dana (Ky.), 501; Stevens *v.* Reeves, 9 Pick. (Mass.) 198; Watt *v.* Hock, 25 Penn. St. 411; Hursh *v.* North, 40 id. 241; Sampson *v.* Gazzam, 6 Port. (Ala.) 123; Haven *v.* Wentworth, 2 N. H. 93; Gallup *v.* Lederer, 1 Hun (N. Y.), 282; Mills *v.* Hallock, 2 Edw. Ch. (N. Y.) 652.

[3] Linsley *v.* Lovely, 26 Vt. 123.

[4] Shackleford *v.* New Orleans R. R. Co., 37 Miss. 202; Harper *v.* Pound, 10 Ind. 32; Buck *v.* Grimshaw, 1 Edw. Ch. (N. Y.) 147; Chastain *v.* Bowman, 1 Hill (S. C.), 276; Collings *v.* Hope, 3 Wash. (Va.) 150; Juggomohun Ghore *v.* Manick-

usage is certain, reasonable and universally acquiesced in, so that every one engaged in the trade knows, or might have known of it, if he had taken the trouble to inquire.[1] If it is sought to establish a usage of a trade to control the meaning of words, it must be shown that the words are used in that trade and are understood in a defined sense, and a mere habit of affixing a special meaning to words when used in one class of contracts does not amount to such a usage as will justify the presumption that they were used in that sense in the contract in question. The proof must go further, and show facts that lead to a conviction that they were used in that case in such sense.[2]

As previously stated, the usage must be proved by the multiplication or aggregation of a great number of particular instances; *but these instances must not be miscellaneous in character, but must have a principle of unity running through their variety, and that unity must show a certain course of business, and an established understanding respecting it.* A usage of trade is a matter of fact, and must be proved like any other fact, and cannot be established by the mere opinion of witnesses. It may be proved by witnesses testifying to its existence and uniformity from their knowledge of it obtained by observation of what is practiced by themselves *and others* in the trade to which it relates, but the *opinions* of witnesses, or their conclusions or inferences as to its effect, either upon the contract or the legal title or rights of parties, are not competent to show the force of such usage or its character.[3] As a general rule, one witness is not sufficient

chund, 7 Moore Ind. App. 263; Smith *v.* Gibbs, 44 N. H. 335; Rapp *v.* Palmer, 3 Watts (Penn.), 178; Lewis *v.* Thatcher, 15 Mass. 433.

[1] Plain *v.* Allcock, 4 F. & F. 1074.

[2] Abbott *v.* Bates, 43 L. J. C. P. 150; Eaton *v.* Smith, 20 Pick. (Mass.) 150; Steward *v.* Scudder, 29 N. Y. L. 96.

[3] The testimony of a single witness is not generally sufficient to establish a usage of trade of which all are bound to take notice. Wood *v.* Hicock, 2 Wend. (N. Y.) 501. But if the witness discloses such familiarity with the trade as to satisfy the jury, the evidence may be sufficient. Robinson *v.* United States, 13 Wall. (U. S.) 366; Partridge *v.* Forsyth, 29 Ala. 200; Vail *v.* Rice, 5 N. Y. 155. Nor is the custom of a particular house of itself sufficient proof of a general usage. Weber *v.* Kingsland, 8 Bos. (N. Y.) 415. In Smith *v.* Floyd, 18 Barb. (N.Y.) 523, it was held that the evidence to es-

to establish a general usage;[1] but the question as to whether the evidence of one witness is sufficient or not, must be determined from the witness's means of information and acquaintance with the business.[2] While, as previously stated, usage cannot be established by the mere opinions of witnesses, yet, if the witness has derived all his knowledge of the usage from his own business, and it is shown to be sufficiently extensive and long continued to warrant the presumption that his knowledge in that respect is general, he may state his belief as to what such custom or usage is.[3] Proof that in one instance the use by a son of his father's name, upon negotiable paper discounted at a bank, was known and acquiesced in by the father, does not authorize the introduction in evidence of subsequent similar acts, for the purpose of showing an implied authority in the son to sign his father's name, without proof that these also were known and acquiesced in by him.[4] Evidence of a custom of manufacturers of iron castings to warrant the quality of the articles made by them, without an express contract to that effect, is admissible in an action founded on such supposed warranty. Evidence that such was the custom at three different establishments, without proof that a contrary usage obtained at

tablish a customary right should not be less than that required to establish a prescriptive right. In Jewell *v.* Carter, 25 Ala. 498, it was held that where there is conflicting evidence, the question as to whether or not a usage is established should be left to the jury, and that where there is the evidence of only one witness thereto, the court should tell the jury that there is no evidence of a usage before them. See also Boardman *v.* Spooner, 13 Allen (Mass.), 359. But this is not the rule now generally recognized, and if a witness testifies fully and explicitly to the existence of a usage, and his testimony is not contradicted, it cannot be assumed as a legal conclusion that the proof is insufficient. Martin *v.* Mobile Bank, 10 Ala. 284; Robinson *v.* United States, 13 Wall. (U. S.) 366; Hasdins *v.* Warren, 115 Mass. 514; Garey *v.* Meaghar, 33 Ala. 630; Chesapeake Bank *v.* Swain, 29 Md. 483.

[1] Halverson *v.* Cole, 1 Spears (S. C.) 321; Thomas *v.* Graves, 1 Mill (S. C.) Const. 309; Bissell *v.* Ryan, 23 Ill. 566; Wood *v.* Hickok, 2 Wend. (N. Y.) 501; Halls *v.* Howell, Harp. (S. C.) 427.

[2] Hamilton *v.* Nickerson, 13 Allen (Mass.), 351; Vail *v.* Rice, 5 N. Y. 155; Partridge *v.* Forsyth, 29 Ala. 200; Robinson *v.* United States, 13 Wall. (U. S.) 365.

[3] Hamilton *v.* Nickerson, 13 Allen (Mass.), 351.

[4] Greenfield Bank *v.* Crafts, 2 Allen (Mass.), 269.

others in the vicinity, is sufficient to authorize the jury to find such to be the general custom.[1] To prove a custom for all the inhabitants of Hampton to deposit sea-weed upon the close of the plaintiffs, the defendant offered evidence that thirty of the inhabitants had done so for many years. It was held that this was competent evidence to be submitted to the jury to prove the custom. So, where a plea alleged a custom in the inhabitants of Hampton to haul sea-weed upon the plaintiff's close, the evidence was, that only those inhabitants of Hampton exercised the right who lived at a convenient distance from the sea-shore, it was held that this was competent evidence of the custom.[2]

A usage governing a question of legal right cannot be proved by isolated instances, but should be so certain, uniform and notorious that it must probably have been understood by the parties as entering into the contract.[3]

Where the fact is material that a purchaser of land has actual knowledge of a right of way over the same, evidence that the way was used for many years, and that the purchaser lived all the time in the same immediate neighborhood, is properly submitted to the jury.[4] The fact that it is shown that a certain method of doing business is "very common," does not establish a usage.[5] To establish a shipping usage on a certain river, the witness may state his habit and custom in shipping on all boats on the river.[6] Proof of the usage of the clerks of steamboats to receive and carry packages from one port to another, without hire, in the expectation that such boat would be preferred by the parties in their shipments of freight, is insufficient to bind the owners; first, because no certain or fixed standard of remuneration is shown, nor that the consignee of the package would be liable to make any return for the risk and labor incurred; and, second, because it is not shown that such usage had grown up with the consent of the owners of vessels, or that

[1] Sumner *v.* Tyson, 20 N. H. 384.
[2] Knowles *v.* Dow, 22 N. H. 71.
[3] Cope *v.* Dodd, 13 Penn. St. 33; The Paragon, 1 Ware (U. S.), 322; Desha *v.* Holland, 12 Ala. 513.
[4] Wissler *v.* Hershey, 23 Penn. St. 333.
[5] Ansill *v.* Crawford, 7 Ala. 335.
[6] Berry *v.* Cooper, 28 Ga. 543.

it was more than a mere accommodation usage.[1] Where the plaintiff relied upon a parol acceptance of a bill of exchange, evidence of a custom of the defendants to accept always in writing and make corresponding entries on their books, was held competent as tending to show in this case that the bill had not been accepted.[2] Where there is proof of an agreed price or compensation, or of a usage which might affect it, or from which an agreement might be inferred. it would not be correct to authorize them to judge of the reasonableness of the charges, irrespective of such agreement or usage; but the court should determine whether, if proved to the satisfaction of the jury, the usage is reasonable or operative.[3] The mere opinions of witnesses are not evidence of a usage.[4] That a railroad company had been for about a month in the habit of storing cotton consigned to their agent, at the warehouse of A., without any proof that this was generally known, or any other evidence that the shipper had notice of it, is not sufficient to bind him.[5] An isolated instance is not sufficient to prove a custom, nor will evidence of the custom of one person be sufficient to establish a general course of trade.[6] When a special custom at the place of shipment is proved, and the question is whether the purchaser had knowledge of the special custom, and contracted in reference to it, the previous course of dealing between the same parties—such as the order, shipment and receipt of several invoices of goods, without any charge for insurance—is sufficient evidence from which the jury may infer knowledge of the special custom.[7] Evidence that "there has always been a custom at a certain saw-mill and other mills in the neighborhood to leave the slabs as belonging to the mill, the owners of the logs never claiming them," does not establish a legal right in the mill as real estate to the slabs sawed.[8] Proof is admissible of a custom among merchants, where merchandise is sold on con-

[1] Cincinnati, &c., Co. *v.* Boal, 15 Ind. 345.

[2] Smith *v.* Clark, 12 Ia. 32.

[3] Codman *v.* Armstrong, 28 Me. 91.

[4] Garey *v.* Meagher, 33 Ala. 630.

[5] Alabama, &c., R. R. Co. *v.* Kidd, 35 Ala. 209.

[6] Burr *v.* Sickles, 17 Ark. 428. Walsh *v.* Frank, 19 Ark. 270.

[8] Adams *v.* Morse, 51 Me. 496.

dition, to deliver it to the buyer before compliance with the condition, and that such change of custody is not *de facto* a waiver of the condition, and the property does not pass thereby.[1] When, in a suit against a railroad company for an injury received while passing along a highway, an issue is made upon the unreasonable or negligent conduct of the company in the use of the highway at the time complained of, its usage at other times has no legitimate bearing upon this issue, and evidence respecting such usage is incompetent.[2] No exception lies to the admission of evidence of a custom existing in a trade without direct evidence that it was known to the opposite party, if the party offering it contends that he can prove, from all the evidence in the case, that it must have been known to him, and that question is argued and submitted to the jury under proper instructions in matter of law.[3] In determining whether a salary or compensation paid to a director of a bridge corporation was a reasonable expense of the corporation, evidence is inadmissible of custom in sundry other corporations to pay directors no salaries as compensation for services.[4] A general usage in any place, by which sales on commission are regulated, may be given in evidence, for it is a reasonable and legal presumption that every man knows the usage of the place in which he traffics, whether by himself or his factor, and, if the usage is not illegal, he is bound by it.[5] Goods being consigned to an agent for sale, with general instructions to remit the proceeds, it is a sufficient compliance with such instructions if the agent remits by a bill of exchange, without indorsing or guaranteeing it, provided such is the usage at the agent's place of business, and the agent uses proper diligence and discretion in the purchase of the bill. In an action against the agent, to recover the proceeds of such a sale, proof of the usage and of a remittance accordingly is a sufficient *primâ facie* defense, and if it is established by the

[1] Farlow *v.* Ellis, 15 Gray (Mass.), 229.

[2] Gahagan *v.* Boston, &c., R. R. Co., 1 Allen (Mass.), 187.

[3] Dodge *v.* Favor, 15 Gray (Mass.), 82.

[4] Central Corp. *v.* Lowell, 15 Gray (Mass.), 106.

[5] Dwight *v.* Whitney, 15 Pick. (Mass.) 179; Goodenow *v.* Tyler, 7 Mass. 36, 46.

agent, the burden of proof is then on the principal to show that bills remitted in pursuance of the usage ought to be indorsed or guaranteed by the agent.[1] A usage may be proved by parol, whether it originates in a public written law, or not.[2] In an action for damages for the want of correspondence between tobacco bought by sample and the samples by which it was sold, evidence showing a custom of dealers in Baltimore of buying and selling in bulk, by samples prepared by the State inspectors, without insuring correspondence in quality, is admissible.[3]

Sec. 42. Need not necessarily be General.

It is not necessary that a usage should be *general*, that is, extend over the whole country, as mere private usages, that is, usages of a particular business house or individual in a certain department of business, may be binding, *if it is shown that the parties knew of it* at the time when the contract was entered into,[4] or knowledge of it in some way is brought home to them, so as to raise a presumption that they contracted in reference to it ; and under this rule it has been held that the custom of banks in reference to a demand of payment, etc., might be shown, although not according to the rules of the common law ;[5] neither is its antiquity of any importance except as in aid of the main point, which is, to show that the parties knew of the usage and intended to adopt it as the law of their contract.[6] With reference to the evidence necessary to support an alleged usage, it may be said that it is not necessary to show either the antiquity, the uniformity, or the notoriety of custom, which in respect

[1] Potter *v.* Morland, 3 Cush. Mass.) 384.

[2] Drake *v.* Hudson, 7 H. & J. (Md.) 399 ; see also Livingston *v.* Maryland Ins. Co., 7 Cranch. (U. S.) 506.

[3] Gunther *v.* Atwell, 19 Md. 157.

[4] Wood *v.* Hicock, 2 Wend. (N.Y.) 501 ; Gahay *v.* Lloyd, 3 B. & C. 793.

[5] Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 581 ; Bank of Columbia *v.* Magruder, 6 H. & J. (Md.) 172 ; Kennebeck Bank *v.* Page, 9 Mass. 155; Loring *v.* Gurney, 5 Pick. (Mass.) 16 ; Leavitt *v.* Simes, 3 N. H. 14 ; Weed *v.* Gorham, 10 Mass. 366 ; Bank of Utica *v.* Smith, 18 John. (N. Y.) 230 ; Emanuel *v.* Robarts, 9 B. & S. 121.

[6] Kendall *v.* Russell, 5 Dana (Ky.), 503 ; Thompson *v.* Hamilton, 12 Pick. (Mass.) 425.

of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. The usage must be shown to be certain and reasonable, and so universally acquiesced in that everybody in the particular trade knows it, or might know it if he took the pains to inquire.[1]

Where it is attempted to engraft on a contract some usage of a particular trade or local custom, the opposite party is at liberty to disprove the usage or custom by the like evidence, and for that purpose to show other previous transactions in like cases between the same parties wherein the supposed usage or custom was not acted on.[2]

If the usage exists, and it is not inconsistent with the written contract, it is precisely the same as if it were written in words attached to the contract, and it cannot be got rid of by proof of an oral agreement to waive or vary it.[3]

The words "*usage* of trade" are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from the general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles and analogies, not from evidence *in pais*, and the knowledge of which resides in the breast of the judge.[4] In these cases evidence of a general custom was not admitted to contradict the law merchant.[5]

[1] Plaice *v.* Allcock, 4 F. & F. 1074; Foxall *v.* International Land Credit Co., 16 L. T., N. S. 637.

[2] Bourne *v.* Gatliffe, 3 M. & G. 643.

[3] Fawkes *v.* Lamb, 31 L. J., Q. B. 98. See also Burgess *v.* Wickham, 3 B. & S. 669; Clapham *v.* Langton, 5 B. & S. 729.

[4] 1 Smith, L. Cases, 7th ed., p. 610; Suse *v.* Pompe, 8 C. B., N. S. 538; 30 L. J., C. P. 75; Meyer *v.* Dresser, 16 C. B., N. S. 646.

[5] In Kidston *v.* Empire Marine Insurance Co., L. R., 1 C. P. 535; L. R., 2 C. P. 357, in an action on a policy of marine insurance, it was held that evidence that expenses incurred in preserving the subject-matter of insurance were not "particular average," but were "particular charges," as those terms were understood in the business of marine insurance, was admissible to show the mode in which such expenses were treated by mercantile men;

But proof of the usage of trade is not admissible to contradict the plain words of an instrument not used in a technical sense; as where a policy of insurance was "on the ship till moored at anchor 24 hours, and on the goods till discharged and safely landed," evidence of a usage that the risk on the goods, as well as the ship, expired in 24 hours, was held inadmissible to qualify the unequivocal words of the policy.[1] So a contract for payment in money cannot be explained to mean payment *in goods;* but it may be shown that goods were in fact accepted as cash in the particular transaction.[2] So where goods are sold under a memorandum to be paid for by bill, oral evidence is inadmissible to show that bill means *approved* bill.[3] So in an action on warranty of "prime singed bacon," oral evidence was rejected of a practice in the bacon trade to receive bacon in some degree tainted as "prime singed bacon."[4] So oral evidence is not admissible to explain the meaning of the words "more or less" in a mercantile contract;[5] or to show that "cargo" and "freight" apply to passengers as well as goods;[6] or to show that boats on the outside of a ship, slung upon the quarter, are not protected by a marine policy in the usual form on the ship and furniture;[7] or to show a custom within the port of London that the insurers of jettisoned goods are only liable for the share of the loss cast upon the owner of jettisoned goods in the general average statement;[8] or to show that a contract to sell "ware potatoes" means a certain sort of "ware potatoes;"[9] or that on a contract to sell wool "to be paid for by cash in one month, less 5 per cent discount," the vendor has a lien on it for payment by usage of the trade.[10] Oral evidence of what the *parties* meant by a

but that the usage proved by it was in affirmance of the common law, and did not control or vary the language of the policy.

[1] Parkinson v. Collier, Park Ins., 6th ed. 416.

[2] Smith *v.* Battams, 26 L. J., Ex. 232.

[3] Hodgson *v.* Davies, 2 Camp. 530.

[4] Yates *v.* Pym, 6 Taunt. 446.

[5] Cross *v.* Elgin, 2 B. & Ad. 106.

[6] Lewis *v.* Marshall, 7 M. & G. 729.

[7] Blackett *v.* R. Exchange Assur. Co., 2 C. & J. 244.

[8] Dickenson *v.* Jardine, L. R., 3 C. P. 639

[9] Smith *v.* Jeffryes, 15 M. & W. 561.

[10] Spartali *v.* Benecke, 10 C. B. 212; 19 L. J., C. P. 293; Godts *v.*

provision in the sale of a cargo, that "14 days are to be allowed for delivery," was not admitted; but if evidence of a *general usage* explaining those words had been offered, it would perhaps have been admissible.[1] In a contract for the sale of tallow by defendant in the name of a broker who was his own representative, the defendant was not allowed to show a custom of trade upon such a contract to look to the broker for its completion.[2] But usage of trade is admissible to show that the broker is personally liable on a contract of sale on behalf of an undisclosed principal.[3] The evidence of such usages may be confirmed by evidence of a similar custom in a similar trade in the same place, *e. g.*, in the colonial market, to corroborate the usage in the fruit market.[4] So by evidence of a similar custom in the same trade at a neighboring place.[5] Where a charter party was signed by the defendants, "as agents for merchants," evidence of a custom was admitted to show that the defendants were liable on the charter party as principals, if their principal's name was not disclosed within a reasonable time.[6]

Sec. 43. Must be Established by Instances of its Application.

A witness, if asked whether a certain usage exists in a particular trade, who answers yes, but is unable to give instances in which to his knowledge it had been acted upon, proves nothing.[7] It is not sufficient to show by a witness belonging to a particular trade, that he does a certain thing in a particular way, but it must also be shown that that is

Rose, 25 L. J., C. P. 61. The case of Spartali *v.* Benecke, *supra*, was a good deal observed upon by the Ex. Ch. in Field *v.* Lelean, 6 H. & N. 627; 30 L. J., Ex. 170, *ante*, p. 24; but the difference of opinion is not as to the principle, but as to the meaning of the contract and the effect of the custom. See also Phillipps *v.* Briard, 1 H. & N. 21; 52 L. J., Ex. 233.

[1] Sotilichos *v.* Kemp, 3 Exch. 105.

[2] Trueman *v.* Loder, 11 Ad. & E. 589.

[3] Humfrey *v.* Dale, 7 E. & B. 266; see also Cropper *v.* Cook, L. R., 3 C. P. 194, 199.

[4] Fleet *v.* Murton, L. R., 7 Q. B. 126.

[5] Plaice *v.* Allcock, 4 F. & F. 1074.

[6] Hutchinson *v.* Tatham, L. R., 8 C. P. 482.

[7] Hall *v.* Benson, 7 C. & P. 911; Cunningham *v.* Fonblanque, 6 C. & P. 44; Geary *v.* Meagher, 33 Ala. 630.

the usual mode adopted in the trade.[1] The course adopted by the trade should be shown,[2] and evidence of an isolated instance is insufficient.[3] But the belief of a witness in the existence of a business usage, as derived from a knowledge of the business for a long series of years, is competent to prove such usage, and it is immaterial that the knowledge is derived wholly from his own business, if that is sufficiently extensive to enable him to testify to the fact of usage.[4] It is not necessary that the witness should be engaged in a particular trade or business to make him competent to testify to a usage pertaining to it. It is sufficient if he has acquired his knowledge by dealing with those engaged in it.[5] Thus, in the case last cited, it was held that the customary mode of banks in respect to certain matters may be proved by a person who has dealt with, but was never employed by them. So the usual mode of transferring notes, drafts, etc., may be proved by a witness who has derived a knowledge thereof in any manner that enables him to testify to the facts.[6] In order to establish the existence of a general usage among banks, or, indeed, in any business, the facts must be shown; that is, the witness must state what is done, and how, and not merely his opinion deduced from the manner of dealing in a few instances in particular banks.[7] The mere opinion of witnesses that, in certain transactions with an agent, it is customary to hold him responsible, is not such evidence of a custom in that respect as will exonerate the principal.[8] A

[1] Pfiel *v.* Kemper, 3 Wis. 315. In this case it was sought to fix the value of professional services by usage, and it was held not competent to ask a witness what he should have charged for the same services; but that the evidence must be either to the value of the services or the customary rate of compensation.

[2] Ruan *v.* Gardner, 1 Wash. 145; Winthrop *v.* Ins. Co., 2 id. 7; Austin *v.* Williams, 2 Ohio, 64. Proof that a particular mode of selling cotton in Mobile "is very common," but that a few factors at that place would not do so, was held insufficient to establish a usage of trade. Anstill *v.* Crawford, 7 Ala. 335.

[3] Burr *v.* Sickle, 17 Ark. 428; Greenfield Bank *v.* Crafts, 2 Allen (Mass.), 269.

[4] Hamilton *v.* Nickerson, 13 Allen (Mass.), 351.

[5] Grippin *v.* Rice, 1 Hilt. (N. Y. C. P.) 184.

[6] Commercial Bank of Pennsylvania *v.* Union Bank of New York, 19 Barb. (N. Y.) 392.

[7] Chesapeake Bank *v.* Swain, 29 Md. 483.

[8] Geary *v.* Meagher, 33 Ala. 630.

usage may be proved by parol, whether it arises from a public written law or not,[1] and the question as to whether or not it can be established by the evidence of one witness, depends upon the extent of his experience and knowledge in that regard. But if one witness swears to the existence of a certain usage, and another equally competent and conversant with the trade or business to which it relates, the existence of the usage is not established, especially where other witnesses could be but are not called.[2] But, generally, when the evidence is conflicting, it should be submitted to the jury to determine whether the usage is established or not. But where there is only the evidence of one witness, and his testimony is not restricted to any particular time or place, and tends to establish a usage in conflict with the law or other well recognized usages, it is proper for the court to tell the jury not to regard it.[3]

Sec. 44. General Usage, how established.

A general usage in a particular place, regulating certain matters, as sales on commission, may always be shown when the usage is reasonable and not contrary to law, and it will be presumed that every one dealing where such usage prevails, knows of and deals in reference to it,[4] and if the usage is not so general as to uphold such a presumption, his knowledge thereof may be shown by the previous course of dealing between the parties, and this furnishes sufficient evidence from which the jury may infer knowledge of the usage.[5] As a general rule, a custom cannot be established from the testimony of one witness.[6] Especially is this the case when the

[1] Drake *v.* Hudson, 7 H. & J. (Md.) 399; Livingston *v.* Maryland Ins. Co., 7 Cranch (U. S.), 506. But where it is sought to prove a usage as an incident of a written contract, the contract itself should be first produced, and then any incident to it arising from usage can be proved by parol, but incidents cannot be proved first to establish the existence of the contract, as to prove a custom of a place by which all notes expire at a certain time. Moore *v.* Eason, 11 Ired. (N. C.) L. 568.

[2] Parrott *v.* Thacher, 9 Pick. (Mass.) 426.

[3] Jewell *v.* Centre, 25 Ala. 498.

[4] Dwight *v.* Whitney, 15 Pick. (Mass.) 179; Goodnow *v.* Tyler, 7 Mass. 36.

[5] Walsh *v.* Frank, 19 Ark. 270.

[6] Vait *v.* Rice, 5 N. Y. 150; Thomas *v.* Graves, 1 Mill (S. C.)

custom sought to be established is one in favor of a certain town or locality. Thus, in a case where it was sought to establish a custom for all the inhabitants of a certain town to deposit sea-weed upon the plaintiff's land, it was held that thirty inhabitants having testified that they had done so for many years, it was competent evidence from which the jury might find the custom.[1] In all cases, in order to establish a customary right, the evidence should not be less than that required to establish a prescriptive right.[2] The burden of proving either a custom or usage of trade devolves upon the party seeking the benefit of it,[3] and must be shown by facts rather than the belief or opinion of witnesses. Thus for a witness to state that a custom or usage exists, without stating instances where it has been acted upon or applied, proves nothing, because the whole matter rests in his opinion or belief, but if he can speak from instances in which it has been acted upon, facts are then presented from which the jury can arrive at a conclusion.[4] While a custom or a usage, at a place distant from that in which it is sought to apply it, may be shown as tending to establish such custom or usage at the place where it is sought to give it effect, yet it has no such tendency unless instances, in which it has been acted upon, are shown at such place.[5] But proof of a single instance at the place in question, unless the effect of such evidence is antagonized by proof of similar transactions in similar establishments in which it was not acted upon.[6] To establish a custom of shippers on a certain river, it is com-

Const. 309; Wood *v.* Hicock, 2 Wend. (N. Y.) 501; Bissell *v.* Ryan, 22 Ill. 566; Partridge *v.* Forsyth, 29 Ala. 200.

[1] Knowles *v.* Dow, 22 N. H. 387. In Hanmer *v.* Chace, 4 DeG. J. & S. 626, it was held that a custom of a manor might be proved by one instance, and in a suit by the lord to restrain a copyholder from digging vitreous sand on his own tenement, evidence of a custom to dig it for twenty-seven years, and of a custom to dig sand generally, was sufficient to establish the custom.

[2] Smith *v.* Floyd, 18 Barb. (N.Y.) 523.

[3] Caldecott *v.* Smythies, 7 C. & P. 808.

[4] Henderson *v.* Charnock, Peake, 4.

[5] Brown *v.* Wilkinson, Co. Lit. 270*b*; Milward *v.* Hilbert, 3 Q. B. 120.

[6] Citizens' Ins. Co. *v.* McLaughlin, 53 Penn. St. 485; Sumner *v.* Lyton, 20 N. H. 384.

petent for a witness to state his practice in that respect on all boats on the river.[1] The fact that a person whom it is sought to affect by a local custom or usage, lives at a great distance from the place where the custom, etc., exists, does not, if the transaction had its *situs* at such place, tend to overcome the presumption that he knew of the custom and contracts in reference to it, as it is regarded as reasonable to presume that a person knows the custom and usages of a place at which he traffics, wherever he may reside.[2] In order to establish a usage of a certain trade or business, the testimony should come from those engaged in the business, or those who are familiar with the existence and application of the usage, but the testimony of a single witness, who testifies that he knew what had been the custom of his neighbors for several years, in relation to certain matters—as in the case cited below, the manner in which farmers receive their supplies from merchants who advanced to them—is not sufficient to establish a usage.[3]

Sec. 45. Illustrations of the Application of the Rule.

An occasional practice tolerated to a certain extent in a certain department of business for any given year, cannot be said to be made out, without distinct proof of some specific instances during the period in question.[4] Opinions or conclusions of witnesses as to the effect of a usage of trade either upon a contract or the legal rights of parties is not admissible to show either the character or force of the usage.[5] In order to disprove the application of a usage or of regulations of a board, as a Chamber of Commerce, having corporate powers, to appoint an inspector of certain classes

[1] Berry *v.* Cooper, 28 Ga. 543.

[2] Dwight *v.* Whitney, 15 Pick. (Mass.) 179; Goodenow *v.* Tyler, 7 Mass. 36. Proof of a custom among merchants, where merchandise is sold on condition, to deliver it to the buyer before the condition is complied with, and that such a change of possession is not in fact a waiver of such condition, is admissible to establish the fact that the title to the property did not pass by such delivery. Farlow *v.* Ellis, 15 Gray (Mass), 229.

[3] Smith *v.* Wright, 56 Ala. 417.

[4] Chenery *v.* Goodrich, 106 Mass. 566.

[5] Haskins *v.* Warren, 115 Mass. 514.

of goods, as in the case cited below provides, one of the purposes of the rules of which is declared to be, "To establish uniformity in the commercial usages of the city," to a certain class of property, it is competent to show that certain classes of articles are specified as subject to the rules or usage, but that the article in question is not named, and the effect of this is to show the non-existence of such usage as to the articles not named.[1] When a sale is made in a place where a board of trade exists, which has established certain rules relating to the sale of certain classes of property, as cotton, and a purchaser being informed of such rules does not dissent or object to them, but proceeds with the contract, those rules become a part of the contract as much as though they had been incorporated into it, although they have not existed or been acted upon long enough to acquire the character either of a custom or usage of the trade.[2]

If a usage in the conduct of a particular business is established in one locality, it will, in the absence of evidence to the contrary, be presumed that it prevails in other similar establishments, at least in the vicinity. Thus, in a Pennsylvania case,[3] a policy was issued by the defendant upon a patent leather manufactory in Pittsburgh, Pa., belonging to the plaintiff. The policy provided that benzole in quantities not exceeding five barrels might be kept in a shed detached from and in the rear of the main building, and nowhere else on said premises. It was well known that benzole was an important and essential article in the prosecution of the business and was necessarily and universally used. The custom of the plaintiff's workmen was to carry an open bucket of it into the factory as often as wanted, and upon the morning of the fire a workman carried an open bucket of it into the factory and set it down, when it almost instantly ignited, and, communicating the flames to the building, it was burned down. To prove that the method of carrying the benzole into the factory in open buckets was

[1] Kershaw *v.* Wright, 115 Mass. 361.

[2] Leigh *v.* Mobile, &c., R. R. Co., 58 Ala. 165.

[3] Citizens' Ins. Co. *v.* McLaughlin, 53 Penn. St. 485.

according to the custom of the trade, it was shown by the testimony of a witness that it was the custom in *twelve* similar factories in Newark, New Jersey, *and no evidence being introduced to show a contrary custom in Pittsburgh*, where the plaintiff's factory was located, it was held sufficient to establish the usage in Pittsburgh. WOODWARD, J., upon this point, said: "We think there was no error in the admission of the evidence of Harden. He gave an intelligible account of the mode of using benzole in twelve similar factories in Newark, New Jersey, and said it was brought in and used from cans and buckets. *If any other custom had been established at Pittsburgh it could have been shown, but in the absence of all other evidence on the subject, this was competent to fix the usage of the business.*" Thus it will be seen that while the usage of a certain trade in one locality is not necessarily the usage of the same trade in another, yet such usage may be proved, and, unless a different usage is shown to exist in the locality to which it is sought to apply it, it will be presumed to be usage of the trade in that locality. In a New Hampshire case,[1] evidence of a custom among iron manufacturers to warrant the quality of all the goods made by them was held to be established by proof of such a custom in three similar establishments in the vicinity, there being no evidence of a contrary custom in any other similar establishment.

A usage must be proved by evidence of facts and instances in which it has been acted upon,[2] and in a case where the question was, whether a certain practice had been tolerated to a certain extent at a custom house, the party denying the practice was held entitled to a ruling that the practice is not established if no witness can recall a specific instance of it.[3]

Sec. 46. Mere Conflict of Evidence as to, does not defeat.

The mere fact that the evidence is conflicting does not entitle the party, against whom the usage is invoked, to a ruling that the usage is not proved, but it is for the jury to

[1] Sumner *v.* Tyson, 20 N. H. 384.
[2] Mills *v.* Hallock, 4 Edw. Ch. 566.
[3] Chenery *v.* Goodrich, 106 Mass. (N. Y.) 652.

say from *all* the evidence whether or not the usage is established.[1] But if only *one* witness testifies to the existence of a usage, and another equally competent and of equal credibility contradicts such evidence, it is not proper to leave it for the jury to say whether the usage is established or not, but they should be instructed that the evidence is insufficient.[2] Upon the question as to whether a certain usage

[1] Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446. In Winsor *v.* Dellaway, 4 Met. (Mass.) 221, where contradictory evidence was offered as to the existence of a usage on which the plaintiff relied to support his action, and the jury were instructed that, if it was proved that the usage existed, and the defendant knew it existed, the plaintiff was entitled to recover, and the jury thereupon returned a verdict for the defendant; it was held that the plaintiff had no cause of exception to such instruction. See also Tunell *v.* Carter, 25 Ala. 498, to same effect.

[2] Parrott *v.* Thacher, 9 Pick. (Mass.) 426. In the absence of better proof it was held that evidence of long and uninterrupted usage, reputation, the declarations and conduct of the owners of the adjoining land, and the public acts of the town, was properly admitted to prove that an ancient corporation of proprietors, now extinct, had dedicated a certain lot to the public use, as a landing place. Sevey's case, 6 Me. 118. Evidence by a justice of the peace that, when called upon by parties to prepare conveyances for them, it was his habit to inquire whether they desired absolute or conditional conveyances; that he had no doubt such inquiry was made in the present instance; that he never failed to shape the paper according to the expressed object of the parties; and that he was also in the habit of reading the papers after they were written to those for whom they were prepared, and especially if they were workmen, was held inadmissible. Pocock *v.* Hendricks, 8 G. & J. (Md.) 421. In an action by commission merchants in Boston, to recover back money paid to the consignor of goods sold by the plaintiffs to a trader in the country, who failed to pay for them, evidence to show a usage of factors in Boston to credit the amount of sales immediately to the account of the principal, and charge back in case of the insolvency of the purchaser, in case the factor has not been negligent; and also to show the usage as to the credit given to city and country purchasers, was held to be admissible. Dwight *v.* Whitney, 15 Pick. (Mass.) 179. Witnesses may be examined to prove the *course* of a particular trade, but not to show what the law of that trade is. Ruan *v.* Gardner, 1 Wash. (U. S.) 145; Austin *v.* Taylor, 2 Ohio, 64. A witness, who had lived both in New York and Mobile, understood it was the custom of merchants that the employer should pay the expenses and passage of clerks who were engaged in the former place to do service in the latter place, for the whole of the ensuing business season; that the witness, who was a merchant, had never so employed or paid a clerk, but he knew of one case where, un-

exists or not, a witness may be asked to describe how, under the usage, a transaction like the one in question would be conducted by all the parties thereto from its inception to its conclusion.[1] It may be said that *a usage of a trade must be proved by the multiplication or aggregation of a great number of particular instances, showing a given course of business, and a general, established understanding respecting it.*[2] It is not necessary that there should be either the antiquity, uniformity or notoriety that is essential to establish a custom; it is sufficient *if it is shown to be so well known and so generally acquiesced in that it may reasonably be presumed to have been imported into their contract by the parties.*[3] In a word, it must be shown that the usage is certain and reasonable, and so universally acquiesced in that every one engaged in the trade knows it, or might know it if he exercised reasonable diligence in making inquiry.[4]

Sec. 47. Effect of Local Usage.

A mere *local* usage is not binding upon a party unless he has notice or knowledge of its existence at the time when the contract was entered into, and the burden of establishing knowledge is on the party setting it up.[5] The usage or custom of a particular port, in a particular trade, is not such a

der a stipulation to that effect, the wages and passage money of a clerk thus employed were paid by the employer. Held, that this evidence was inadmissible, and consequently incompetent to establish the usage or custom of trade. Price *v.* White, 9 Ala. 563. The plaintiff having proved that a steamboat of the defendants was engaged in carrying goods and merchandise, generally, for hire, and the general custom of boats engaged in similar business with that of the defendant, held that it was admissible for the defendant to explain the usage, by showing that no freight or compensation was ever charged or allowed upon remittance of money, unless some evidence was given by the boat of its receipt, in which event only, a charge was made. Knox *v.* Rives, 14 Ala. 249.

[1] Kershaw *v.* Wright, 115 Mass. 361.

[2] MacKenzie *v.* Dunlop, 3 Macq. H. L. Cas. 22.

[3] Juggomohun Ghore *v.* Manickhund, 7 Moore Ind. App. 263.

[4] Place *v.* Allcock, 4 F. & F. 1074.

[5] Kirchner *v.* Venus, 12 Moo. P. C., N. S. 361; Rogers *v.* Mechanics' Ins. Co., 1 Story (U. S.), 603; Hall *v.* Howell, Harp. (S. C.) 427; Simpson *v.* Margetson, 11 Q. B. 32; Albatross *v.* Wayne, 16 Ohio, 513; Latimer *v.* Alexander, 14 Ga. 250; Flynn *v.* Murphy, 2 E. D. S. (N. Y. C. P.) 378; Barnard *v.* Kellogg, 10 Wall. (U. S.) 383.

usage or custom as will, in contemplation of law, limit, control or qualify the language of a contract of insurance. It must be some *known*, *general* usage or custom in the trade, both applicable and applied to all the ports of the State, and so notorious as to afford a presumption that all contracts of insurance in that trade are made in reference to it as a part of the policy.[1] Indeed, any usage, to be binding, must be established by such clear and satisfactory evidence that a presumption naturally arises that the parties contracted in reference to it.[2]

A custom in a place from which goods are shipped, is not necessarily binding upon a consignee at another place, and from the mere fact of the existence of a certain custom at the place of shipment, a jury would not be warranted in presuming that such a usage existed at the place to which the goods were consigned. Thus, the fact that a usage existed at a city from which goods were shipped, that the bill of lading shall not be detached from the draft until the draft is paid, was held not sufficient to warrant the jury in presuming that such usage existed in a neighboring city to which the cargo was consigned.[3] In order to make such a usage valid, it must be recognized and acted upon in both cities, and mere proof of its existence in one place does not warrant an inference that it exists at another.[4] But when instances of its application in one place are shown, it may be shown to exist in other places for the purpose of establishing uniformity or notoriety.[5] The usage at the place of manufacture prevails, rather than the place of sale, where the contract relates to the manufacture of an article.[6]

[1] Rogers *v.* Mechanics' Ins. Co., *ante;* Pittsburgh Ins. Co. *v.* Dravo, 2 Weekly Notes Cases, 194; Dean *v.* Swoop, 2 Binn. (Penn.) 72; Adams *v.* Ins. Co., 76 Penn. St. 411; Cope *v.* Dodd, 13 id. 33; McMasters *v.* R. R. Co., 69 id. 374.

[2] Bowling *v.* Harrison, 6 How. (U. S.) 259; Strong *v.* Carrington, 11 Am. Law Reg. 287; Olericks *v.* Ford, 23 How. (U. S.) 49; Collings *v.* Hope, 3 Wash. (U. S. C. C.) 149; Pierpont *v.* Fowle, 2 W. & M. (U. S. C. C.) 24.

[3] Kirchner *v.* Venus, 12 Moore P. C. C. 361; 7 W. R. 455; Mears *v.* Waples, 3 Houst. (Del.)

[4] Reynolds *v.* Continental Ins. Co., 36 Mich. 131.

[5] Citizens' Ins. Co. *v.* McLoughlin, 53 Penn. St. 485.

[6] Star Glass Co. *v.* Morey, 108 Mass. 576.

In New York it is held that proof of a *local* usage is inadmissible to control the rules of law respecting a particular trade;[1] or to vary an express agreement;[2] or add incidents thereto contrary to the rules of the general law, as to import a warranty where *caveat emptor* applies;[3] or to qualify the plain provisions of a contract about which there is no ambiguity;[4] or to contradict its plain legal import;[5] or to overcome a settled rule of commercial law, but it may be received to explain it.[6] A local usage cannot be given effect to vary a contract, as a usage for pledgees of stock to transfer it at pleasure, when the contract of pledge only provided that it might be transferred after default.[7] The same rule was also applied to a usage offered to alter the legal effect of an insurance policy.[8] And to a usage to satisfy contracts for the sale of flour of a specified brand, by the delivery of other brands of equal or better quality.[9] Or to admit of the delivery of an article made from different materials from those specified in a contract, as where a contract is to build a "*black walnut*" counter, to show that it is customary to make the tops and door panels of such counters

[1] Higgins *v.* Moore, 34 N. Y. 417; Minnesota R. R. Co. *v.* Morgan, 52 Barb. (N. Y.) 217; Bissell *v.* Campbell, 54 N. Y. 353.

[2] Main *v.* Eagle, 1 E. D. S. (N. Y. C. P.) 619; Stebbins *v.* Brown, 65 Barb. (N. Y.) 274; Beals *v.* Terry, 2 Sandf. (N. Y.) 127.

[3] Hawes *v.* Lawrence, 3 Sandf. (N.Y.) 193; also 4 N.Y. 345; Beirne *v.* Dord, 5 N. Y. 95.

[4] Callender *v.* Dinsmore, 55 N.Y. 200; Bradley *v.* Wheeler, 44 id. 495; Mercantile, &c., Ins. Co *v.* State Ins. Co., 25 Barb. (N. Y.) 319; Groat *v.* Gile, 51 N. Y. 431; Simmons *v.* Law, 8 Bos. (N. Y.) 213.

[5] Holmes *v.* Pettingill, 1 Hun (N. Y.), 316; Allen *v.* Dykers, 3 Hill (N. Y.), 593; Dalton *v.* Daniels, 2 Hilt. (N. Y. C. P.) 472; Vail *v.* Rice, 5 N. Y. 155; Lombardo *v.* Case, 45 Barb. (N. Y.) 95; Sewall *v.* Gibbs, 1 Hall (N.Y.), 602; Lawrence *v.* Maxwell, 53 N. Y. 19; Taylor *v.* Ketchum, 35 How. Pr. (N. Y.) 289; Wadsworth *v.* Alcot, 6 N. Y. 64; Spears *v.* Hart, 3 Robt. (N.Y.) 420; Currie *v.* Smith, 4 Leg. Obs. (N. Y.) 343; Lane *v.* Bailey, 47 Barb. (N. Y.) 395; Wall *v.* Ins. Co., 3 Duer (N. Y.), 264; Bargett *v.* Oriental Ins. Co., 3 Bos. (N. Y.) 385; Suydam *v.* Clark, 2 Sandf. (N. Y.) 133.

[6] Frith *v.* Barker, 2 John. (N.Y.) 327; Emery *v.* Dunbar, 1 Daly (N. Y. C. P.), 408; Bowen *v.* Newell, 8 N. Y. 190; Gibson *v.* Culver, 17 Wend. (N. Y.) 305.

[7] Dykers *v.* Allen, 7 Hill (N. Y.), 497; affirming S. C., 3 id. 593; Vail *v.* Rice, 5 N. Y. 155; Currie *v.* Smith, 4 Leg. Obs. (N. Y.) 343.

[8] Stebbins *v.* Globe Ins. Co., 2 Hall (N. Y.), 632; Mutual Safety Ins. Co. *v.* Hone, 2 N. Y. 235.

[9] Beals *v.* Terry, 2 Sandf. (N. Y.) 127.

of stained white wood.[1] Or to treat as a delivery that which is not in law a delivery.[2] A local usage can never vary the construction of a contract, unless it is clearly proved that its existence was known to the parties, and that their contract was made in reference to its terms.[3] Nor if it contradicts the contract.[4] A custom of a particular locality for the owner of a lot of land, after giving notice to the owner of an adjoining lot to build his half of a partition fence, and his refusal to do so, to build the whole, and hold the party refusing for his share of the expense, has been held to be a reasonable and just custom, which may be enforced.[5] A shipper of goods is chargeable with notice of an established and well-known usage, existing in a particular trade, in regard to the stowage of a general ship, both as to the manner of stowing, and as to the different articles to be stowed together. And if the shipper, in such case, gives no special instructions, and his goods are stowed in conformity with such usage, he is deemed to have assented to such mode of stowage, and cannot, in case his goods are injured on the voyage, in consequence of the mode of stowage, set that up as a ground of complaint, or as a foundation for depriving the owners of their freight.[6] Where a cargo was carried by a vessel "addressed to" the owner of the cargo, he was held to be entitled to no commissions on the freight, and any usage giving him commissions in such a case was held to be an unreasonable one, and the shipper was allowed no deduction from the freight, because wood and water, usually stowed on deck, had been stowed below, as it appeared that the bulkheads had been so moved as to give about the same amount of room.[7] In a case where a master and his vessel were employed near Canton, in China, in a service not strictly within their ordinary offices, and not, originally, in any way contemplated, the ship being used, by an arrangement with the

[1] Greenstine *v.* Borchard, 50 Mich. 434; 45 Am. Rep. 51.

[2] Suydam *v.* Clark, 2 Sandf. (N. Y.) 133; and see Smith *v.* Lynes, 5 N. Y. 41.

[3] Wheeler *v.* Newbould, 5 Duer (N. Y.), 29; affd., 16 N. Y. 392.

[4] Sweet *v.* Jenkins, 1 R. I. 147.

[5] Knox *v.* Artman, 3 Rich. (S. C.) 283.

[6] Baxter *v.* Leland, 1 Blatch. (U. S. C. C.) 526.

[7] Jelison *v.* Lee, 3 W. & M. (U. S. C. C.) 368.

agent of the owner at Canton, for twenty-two months, as an opium store-ship, and, according to usage, a sum of five dollars on each box was paid on the delivery of the opium, which was called a "kumshaw," and which was exclusive of the price paid for storage, and the "kumshaws" were paid to the master, with the acquiescence of the agent, there having been no express agreement made with respect to the same, it was held, in a suit by the owner of the vessel against the master, to recover the "kumshaws," as a part of the earnings of the vessel, that it should be left to the jury to say whether, by the usage of the trade, the "kumshaws" belonged to the master.[1] The court must judge of the reasonableness and validity of any usage. Thus, where there is proof of an agreed price or compensation, or of a usage which might affect it, or from which an agreement might be inferred, it would not be correct to authorize them to judge of the reasonableness of the charges, irrespective of such agreement or usage; but the court should determine whether, if proved to the satisfaction of the jury, the usage is reasonable or operative.[2] Exercising this power, it has been held that a local custom that ship-owners shall be liable for the negligence of their agents, in cases where the statute exempts them from liability, is unreasonable and therefore invalid.[3] So, too, that evidence of a custom that a master of a vessel in a particular port has no authority to bind his owners for necessaries furnished to the vessel, is inadmissible, as it would contradict and control a settled rule of maritime law, of universal application.[4]

In a New York case,[5] in an action on a contract to deliver certain railroad stock, it was held that the plaintiff would not be permitted to prove that, by the general custom of brokers and dealers in stocks in the city of New York, the words "dividends or surplus dividends," in the contract,

[1] Willcocks *v.* Phillips, 1 Wall., Jr. (U. S.) 47.

[2] Codman *v.* Armstrong, 28 Me. 91.

[3] Walker *v.* Trans., &c., Co., 3 Wall. (U. S.) 15.

[4] Bliss *v.* Ropes, 9 Allen (Mass.), 369.

[5] Lombardo *v.* Case, 45 Barb. (N. Y.) 205.

were intended to mean dividends declared on the stock, whether they had been announced before or after the date of the contract, provided that on the day the contract was made the stock was selling in the market "dividend on," and not "ex-dividend," for the reason that effect could not be given to the custom without making a new contract between the parties. It was also held in the same case that the words "six months from date" cannot, by proof of any custom, be extended or explained to mean or include "a day or two before date." In a New Jersey case[1] it was held that the holder of a check drawn upon a bank cannot avail himself of a custom by which banks belonging to an association called the clearing house, of which the drawee was one, are bound to return checks presented through the clearing house, and which they have no funds to pay, upon the same day, or before banking hours of the next day, under penalty of being liable for the same, and that the fact that the check was presented through the clearing house by a bank which belonged to that association, and acted as the agent of the holder, can make no difference, as customs in derogation of the common law must be strictly pleaded, and when well pleaded, the count must show a case clearly within the usage. Therefore an allegation of a custom that when a check is presented at the clearing house to a bank against which the check is drawn, it shall be returned within a certain time if not paid, does not cover the case of the presentment of a check to a bank which is the agent of the bank upon which it is drawn. In an action against a railroad company, by a person employed in repairing their road, to recover for injuries received while being carried by them to his work, the defendants alleged that the plaintiff was negligent in riding in the baggage car. It was held that evidence that it was the custom for such workmen to ride in the baggage car was admissible.[2] In an action upon a contract to receive at a future day a certain number of barrels of flour at a fixed price, evidence is not admissible to prove a custom that either party to such a contract has a right to

[1] Overman *v.* Hoboken City B'k, 30 N. J. L. 61.

[2] O'Donnell *v.* Allegheny R. R. Co., 50 Penn. St. 490.

demand a margin to be put up, reasonably sufficient to secure the performance of the contract.[1] When a special contract is proved, evidence is not admissible to show a conflicting general custom.[2] In an action by the payee of a note given for the purchase-money of a mining claim in California, evidence of a custom there for the vendor to return a note so given if the claim proved unprofitable, as it did in this case, is not a defense without proof that the custom was known to the plaintiff, and even if the custom set up had been well established, it would be invalid because unreasonable.[3] Evidence of a usage with other banks organized under the same law to discount more than the legal rate of interest, upon the acquisition of business paper, is not admissible in a suit by a bank upon the paper so discounted,[4] because a usage in violation of a statute, or which furnishes a pretext or excuse for avoiding it, is bad.[5] Special usages are not binding, unless known to the party sought to be charged thereby. Thus, if the master of a vessel hires a berth for her at a wharf, without notice of any rule of that wharf concerning the mode of discharging cargoes different from the usage at similar wharves in the same port, a stevedore whom he employs to discharge his cargo may do so according to such usage, and, if prevented by the wharfinger, may maintain an action against him for damages.[6] So in an action on a policy of insurance, evidence of a local custom amongst insurers, not communicated to the insured, nor of such notoriety as to afford any presumption of knowledge on his part, is not admissible.[7] But in an action on a policy of insurance, evidence is competent to prove a usage that where there has been a verbal agreement for insurance, and the terms agreed upon and entered in the books of the company, the contract for insurance is considered as valid

[1] Oelrichs *v.* Ford, 21 Md. 489.

[2] Exchange Bank *v.* Cookman, 1 W. Va. 69; Detwiler *v.* Green, ib. 109.

[3] Leonard *v.* Peeples, 30 Ga. 61.

[4] Niagara County Bank *v.* Baker, 15 Ohio St. 68.

[5] New York Fireman's Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678; Bank of Utica *v.* Wager, 2 id. 712; Dunham *v.* Dey, 18 John. (N. Y.) 46.

[6] Croucher *v.* Wilder, 98 Mass. 322.

[7] Hartford Protective Ins. Co. *v.* Harmer, 2 Ohio St. 452.

for the insured, although the premium is not paid.[1] The practical adoption and use, for a long time, of a particular route, under a right of way granted by deed, without fixed and defined limits, if acquiesced in by the grantor, operate to determine the location of the way as effectually as if the same had been described in the deed, because by acquiescing in the continued use of such route the owner of the land is treated as licensing that as the way granted, and the other by using it is treated as electing to adopt it.[2] In an English case the defendant chartered the plaintiff's vessel to proceed to Newcastle-on-Tyne, and there be ready forthwith, "in regular turns of loading," to take on board by spout or keel, as directed, a complete cargo of four keels of coal, and the remainder coke. In an action for not loading the vessel with coke within a reasonable time, it was held that evidence was admissible to explain the meaning of the expression in the charter party, "in regular turns of loading," by showing that there was a usage of the port of Newcastle that vessels should take in their cargoes of coke in a certain regular order or turn, and that the question whether the vessel was loaded within a reasonable time ought not to be decided without reference to such usage, if proved.[3]

Evidence of a usage in a certain town to sell lumber without measuring it is admissible if the lumber to which it is sought to be applied is not shown to have been brought into the town by water and as such required by statute to be measured.[4]

Sec. 48. What Usages are valid. Illustrations.

In order to be valid and binding, it is necessary that a usage should be reasonable, and it has been held that it is not reasonable if an honest or right-minded man would deem it unfair or unrighteous.[5] It is very evident that this is a

[1] Baxter *v.* Massasoit Ins. Co., 13 Allen (Mass.), 320.

[2] Bannon *v.* Angier, 2 Allen (Mass.), 128.

[3] Leideman *v.* Schultz, 14 C. B. 38.

[4] Lee *v.* Kilbourne, 3 Gray (Mass.), 594.

[5] Paxton *v.* Courtney, 2 F. & F. 131; see Leuckhart *v.* Cooper, 3 Scott, 521; 3 Bing. N. C. 99; see also Southwestern Freight, &c., Co. *v.* Stanard, 44 Mo. 71.

necessary incident. Usages are the result of the experience of mankind, and have been planned with a view to their convenience. But nothing absolutely unreasonable could result from the former, or tend to produce the latter. The self-will of an individual might make dishonesty or nonsense paramount for a day, but the experience of men never could consecrate what was unrighteous, their convenience and comfort never could be subserved by what was unjust or unreasonable. Where evidence of a usage has been admitted, therefore, evidence may be given in reply, tending to show that such a supposed usage would be unreasonable.[1] A usage or custom that makes a negotiable instrument transferable without indorsement is against the policy of the law, and therefore invalid. Thus, a local custom among cotton dealers making a warehouse receipt transferable by delivery without indorsement, and such mere transfer to pass the title to the cotton unless notice is given that a receipt has been lost or got into the hands of some one not entitled to hold it, was held bad.[2] So a usage that no title passes upon an ordinary sale and delivery—no lien being reserved by contract—without actual payment of the purchase-money, is invalid.[3] In the case last cited the court took occasion to place the ground of invalidity upon the circumstances that it was an attempt by usage to engraft terms upon a contract inconsistent with the rules of common law, but it would seem that the true ground of invalidity is the circumstance that such a usage is against the policy of the law. So is a usage requiring a consignee to receipt for a certain quantity of property before he has had an opportunity to ascertain whether the quantity named in the receipt has been delivered ;[4] and the same is true as to a usage for the master of a vessel to sell the cargo of a stranded vessel without necessity ;[5] or authorizing a person to charge

[1] Bottomly *v.* Forbes, 5 Bing. N. C. 128.

[2] Lehman *v.* Marshall, 47 Ala. 362.

[3] Haskins *v.* Warren, 115 Mass. 514.

[4] Gallup *v.* Ledener, 1 Hun (N. Y.), 282.

[5] Bryant *v.* Conn. Ins. Co., 6 Pick. (Mass.) 145 ; Stillman *v.* Hurd, 10 Tex. 107.

for services never rendered, or material never furnished ;[1] or authorizing an agent to violate the instructions of his principal ;[2] exempting carriers from liability for negligence ;[3] or favoring the violation of a statute;[4] or conferring a right of action upon contracts void under the Statute of Frauds, or barred by the Statute of Limitations ;[5] or to transfer settlement rights by death-bed donations without a will ;[6] or for factors to pledge the goods of their principal ;[7] or to construe a contract for articles by the ton, as calling for 2,200 pounds for a ton instead of 2,000 pounds, as fixed by statute ;[8] or one that is in restraint of trade ;[9] or that deprives a person of his property without compensation, as a usage of a bank not to correct mistakes in counting money unless it is discovered before the party leaves the bank ;[10] or that exempts a person from liabil-

[1] Whitesides *v.* Meredith, 3 Yeates (Penn.), 318 ; Kendall *v.* Russell, 5 Dana (Ky.), 50.

[2] Banksdale *v.* Brown, 1 N. & M. (S. C.) 519 ; Catlin *v.* Smith, 24 Vt. 85.

[3] Schooner Reeside, 2 Sum. (U. S.) 574.

[4] Dunham *v.* Dey, 13 John. (N. Y.) 44 ; Supervisors *v.* Van Rief, 1 Hun (N. Y.), 45.

[5] Dunham *v.* Gould, 13 John. (N. Y.) 367.

[6] Westfall *v.* Singleton, 1 Wash. (Va.) 227.

[7] Newbold *v.* Wright, 4 Rawle (Penn.), 195.

[8] Evans *v.* Myers, 25 Penn. St 114 ; Green *v.* Moffat, 22 Mo. 529

[9] Williams *v.* Gilman, 3 Me. 281.

[10] Gallatin *v.* Bradford, 1 Bibb (Ky.), 207. Where a custom for the inspector of flour to take to his own use the draft flour, drawn out to be examined, was set up, it was held that it was contrary to the policy of the law ; that the statute providing certain fees for inspection, thereby impliedly forbade all other compensation ; that it could not be more ancient than the inspection laws, and that they were not old enough to be immemorial, though beyond the actual memory of those then living ; that though this custom had existed under the old laws, and the legislature, in remodeling them, had not expressly negatived the custom, yet that this silence was not a legislative recognition of it And where such inspector of flour claimed that he could not inspect by boring a half-inch hole in the head of the barrel, and that the custom allowed him to use a larger auger ; the old law required him to inspect flour by a half-inch hole, while the new code required all inspectors of flour, fish, butter, &c., to inspect by a half-inch hole or in some other satisfactory manner, and required the hoops of barrels offered for inspection to be nailed. It was held that the code did not change the method of inspection established by the old law, and that it was no answer to a *mandamus* to compel the inspector to inspect a certain lot of flour by a half-inch hole, that he could not so inspect it properly, and that the custom authorized him to use a larger hole, as both the answer and

ity where he is made liable by statute, or makes him liable where he is exempt therefrom by statute ;[1] or that permits a person to commit acts of trespass upon others' property ;[2] or permits an individual to appropriate to his exclusive use, rights which belong equally to all the public ;[3] or which permits a person to take anything from another's land,[4] or to take another's property ;[5] or that permits an intermediate carrier to deduct from back freight carried, any deficiency in the cargo as shown by a comparison of the bill of lading with the measurement of the carrier receiving it ;[6] or which continues the liability of a carrier after his liability is discharged by the general law ;[7] or which permits an agent to warrant the quality of goods sold by him, although not authorized to do so by his principal ;[8] or to ascertain the quantity by measurement, where the articles are sold by the dozen, hundred or thousand, instead of by count ;[9] or any

the custom would be in contravention of the statute under which he held his office. Dalaplaine *v.* Cranshaw, 15 Gratt. (Va.) 457.

[1] Walker *v.* Trans. Co., 3 Wall. (U. S.) 150.

[2] Waters *v.* Lilly, 4 Pick. (Mass.) 145.

[3] Freary *v* Cook, 14 Mass. 488.

[4] Perley *v.* Langley, 7 N. H. 233. A custom to take fish, or to take sand from another to make mortar *in alieno solo*, is void. Waters *v.* Lilly, *ante ;* Lupkin *v.* Haskell, 3 Pick. (Mass.) 356 ; Littlefield *v.* Maxwell, 31 Me. 134.

[5] Wadley *v.* Davis, 63 Barb. (N. Y.) 500.

[6] Strong *v.* G'd Trunk R. R. Co., 15 Mich. 206.

[7] Reed *v.* Richardson, 98 Mass. 216.

[8] Dodd *v.* Farlow, 11 Allen (Mass.), 426.

[9] Sweeney *v.* Thomason, 9 Lea (Tenn.), 359; 42 Am. Rep. 376. There may be some doubt in the accuracy of this doctrine, and an examination of the case will show that really there was no proof of such a usage as was claimed, and there was direct proof that the defendant never heard of the usage, and from the circumstances there was no ground for a presumption that he knew of it. The contract was for brick by the thousand "in the wall," and the usage claimed, was to ascertain the number by measurement, instead of by count. In Smith *v.* Wilson, 3 B. & Ad. 728, it was held that the word "thousand," used in a lease in reference to rabbits, might be shown to mean twelve hundred. In Sorther *v.* Kellerman, 18 Mo. 509, proof of a usage was admitted to show that two bunches of shingles were regarded as one thousand, without regard to the actual number. See also Miller *v.* Stevens, 100 Mass. 515 ; and Heald *v.* Cooper, 8 Mo. 32, all of which are opposed to the principal case. See also Merrick *v.* McNulty, 26 Mich. 374 ; where it was held proper to admit proof of a usage to reject fractions

custom or usage that originates in, or is continued by oppression or fraud, or is contrary to the policy of the laws, morality and religion, is void, and cannot be set up either to protect rights acquired under, or to defeat rights acquired in opposition to them.[1]

Sec. 49. Usage as a Means for ascertaining the Meaning of Words and Phrases.

While, generally, words are used in contracts in their ordinary sense, yet it is a matter of common knowledge that in a particular trade or business, words having a well understood meaning in ordinary transactions have acquired a technical sense entirely different from their ordinary signification, so that if in that class of contracts the words were to be given their ordinary interpretation, the intention of the parties would be wholly subverted. So, too, there is a class of words which are purely local or technical which are used in a particular locality or science or trade, and very often the same words which have a common and universal meaning, also acquire a local or technical significance, and in either case evidence of usage is admissible to explain the local, technical or peculiar meaning in the trade or business to which the contract relates, provided sufficient is proved to raise a presumption that the parties intended to use the words in their technical or peculiar sense, or the fact can be inferred from reading the contract itself. It may be stated, as a general rule, that oral evidence is always admitted to show the sense in which, according to the custom of merchants, a mercantile contract is to be understood,[2] and in such cases it is unobjectionable to ask a witness whether there is any generally understood meaning of certain words among persons engaged in the particular trade or business

of a foot in measurement, and Brooks *v.* Brooks, 25 Penn. St. 210; where it was proof of a usage that where lumber is sold by the "thousand feet," lineal measure is intended, and Lorther *v.* Kellerman, 18 Mo. 509; where evidence of a usage was admitted to show that *two packs* of shingles make 1,000.

[1] Holmes *v.* Johnson, 42 Penn. St. 159.

[2] Wigglesworth *v.* Dallison, 1 Smith's L. C. *n.*

under consideration,[1] and indeeds it would seem that such a question must be put to the witness before he is asked what he understands by the written contract to which it is meant to apply the usage.[2] Thus the words "fur,"[3] "freight,"[4] "weeks,"[5] "day,"[6] "thousand,"[7] "level,"[8] "inhabitant,"[9] "roots,"[10] "building,"[11] and many other words which it would not be profitable to enumerate have been interpreted by extrinsic evidence, although *prima facia* they presented no ambiguity, and their peculiar meaning when found in connection with the subject-matter of the transaction has been fixed by parol testimony of the sense in which they are *usually* understood when employed in cases similar to that under investigation.

A contract of hiring may be qualified by proof of customary holidays;[12] a sack of hops at 100*s.* may be explained to mean £5 *per cwt.*;[13] a contract for the sale of cider may be explained, by local usage, to mean apple juice before it has been made into cider in its usual form.[14] So parol evidence has been admitted to prove the meaning of the word "privilege" in a contract between ship-owner and captain;[15] of the meaning of "mess pork" in a contract of sale;[16] of the words "across the country" in a wager on a race;[17] of the meaning of the word "bale," and the quantity usually contained therein, in contracts for the sale of articles by the bale;[18] and, in a New Jersey case,[19] a lease of premises con-

[1] Robertson *v.* Jackson, 2 C. B. 412.

[2] Curtis *v.* Peck, 13 W. R. 230.

[3] Aster *v.* Union Ins. Co., 7 Cow. (N. Y.) 202.

[4] Peisch *v.* Dickson, 1 Mas. (U. S.) 11; Lewis *v.* Marshall, 7 M. & G. 729.

[5] Grant *v.* Maddox, 16 L. J. N. S. Exch. 227.

[6] Cochran *v.* Retbery, 3 Esp. 121.

[7] Smith *v.* Wilson, 3 B. & Ad. 728.

[8] Clayton *v.* Gregson, 5 Ad. & El. 302.

[9] Rex *v.* Mashiter, 6 Ad. & El. 153.

[10] Coit *v.* Commercial Ins. Co., 7 John. (N. Y.) 385.

[11] Livingston *v.* Ten Broeck, 16 id. 14.

[12] Rex *v.* Stoke-upon-Trent, 5 Q. B. 303.

[13] Spicer *v.* Cooper, 1 Q. B. 424.

[14] Studdy *v.* Sanders, 5 B. & C. 628.

[15] Birch *v.* Depuyster, 4 Camp. 385.

[16] Powell *v.* Horton, 2 N. C. 668.

[17] Evans *v.* Pratt, 3 M. & G. 759.

[18] Gorrissen *v.* Perrin, 2 C. B. N. S. 681; Taylor *v.* Briggs, 2 C. & P. 525.

[19] Smith *v.* Clayton, 29 N. J. L. 357.

tained a provision that "should the said A. sell the last-mentioned lot at any time after the said C. has planted the same, he shall have the privilege of sowing *grain* on the same. The lessor having sold the land after C. had planted the land, he sowed oats on the corn ground the succeeding spring, and the question was whether he was not restricted to the sowing of winter grain. The court held that evidence of the meaning of the word "*grain*," as used in common parlance, was not admissible, but that it was the duty of the court to determine its meaning. But that parol evidence of the meaning of a word that is ambiguous or made so by evidence, may be shown.[1] So usage has been admitted to show what was meant by the word "team;"[2] to show what was meant by the words "all faults," in a contract where certain property was sold "with all faults," and generally where it is shown that a word has acquired a special or technical meaning in a certain trade, it may be shown, because it is presumed that every person conducting such trade uses the language of the trade, and makes his contracts in conformity with the sense in which such language is therein employed.[3] And the same rule prevails where words are used in a peculiar sense in a certain district or locality.[4] The usage of a trade is admissible to fix the exact liability of the parties in cases where the contract is silent in that respect, and the law has fixed no definite standard. Thus,

[1] See Hart *v.* Hammett, 18 Vt. 127; Patch *v.* Ins. Co., 44 Vt. 481; Collender *v.* Dinsmore, 55 N.Y. 204; Collins *v.* Driscoll, 34 Conn. 43; Avery *v.* Stewart, 2 Conn. 69; Eaton *v.* Smith, 20 Pick. (Mass.) 150; Walls *v.* Bailey, 49 N. Y. 464; Taylor *v.* Sotolingo, 6 La. An. 154; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332; Drake *v.* Gorce, 22 Ala. 409; Hooper *v.* R. R. Co., 27 Wis. 81; Soutier *v.* Kellerman, 18 Mo. 509; Johnson *v.* Ins. Co., 39 Wis. 87; Fitch *v.* Carpenter, 43 Barb. (N. Y.) 50; Wait *v.* Fairbanks, Bray (Vt.),77; Stewart *v.* Smith, 28 Ill. 397; Jenny Lind Co. *v.* Bower, 11 Cal. 194; Reynoulds *v.* Jourdan, 6 Cal. 108; Dent *v.* Steamship Co., 49 N. Y. 320; Schnitzer *v.* Print Works, 114 Mass. 123; Page *v.* Cole, 120 Mass. 37; Howard *v.* Ins. Co., 109 Mass. 387; Murray *v.* Hatch, 6 Mass. 465.

[2] Ganson *v.* Madigan, 15 Wis. 144.

[3] Whitney *v.* Boardman, 18 Mass. 44; Carter *v.* Coal Co., 77 Penn. St. 286; Mieghan *v.* Bank, 25 id. 288.

[4] Pope *v.* Nickerson, 3 Story (U. S.), 465; Trimble *v.* Vignier, 1 Bing. (N. C.) 151; De La Viga *v.* Vianna, 1 Br. Ad 284; De Wolfe *v.* Johnson, 10 Wheat. (U. S.) 367; Clayton *v.* Greyson, 5 Ad. & El. 502; Aben *v.* Carson, 62 Mo. 207.

in a contract by which A. agrees to work for B. ten days, at $2.50 a day, the contract seems definite enough; but A. has really worked 120 hours, and the question is, has he worked *more* or *less* than ten days? If he has worked *more* than that number of days, he is entitled to additional pay in the proportion that the excess bears to the price per day; if *less*, then B. is entitled to a proportionate deduction. The law has fixed no definite standard, therefore usage is the only instrumentality that can be brought in to solve the question, and the courts admit it.[1] So to show what is meant by the words "weeks," "months," etc., in a certain class of contracts.[2] So, too, where certain work, as "plastering" a house, or "laying a cellar wall," etc., is to be done at so much per square yard, evidence of the usage of plasterers, in the locality where the contract was made, has been held admissible to determine whether, in ascertaining the quantity, the whole sides of the house should be measured as solid, or whether allowances should be made for openings of windows and doors. The courts justly hold that contracts of this character are ambiguous to the extent that evidence of the usage of the trade is admissible to ascertain the true method of measurement and the number of yards, etc., that should be paid for, provided the usage is not unreasonable.[3] It may be stated as a general rule, that *where a word or phrase used in a contract is susceptible of two or more meanings, extrinsic evidence is admissible to ascertain in which sense it was employed by the parties*, and if a usage exists by which the words, in the trade to which the contract relates, have acquired a definite meaning, that is regarded as the real exponent of the true intention of the parties.[4]

And in the same manner the meaning of certain phrases is ascertained. Thus the phrases "coppered ship,"[5] "store

[1] Hinton *v.* Locke, 5 Hill (N. Y.), 437.

[2] Grant *v.* Maddox, 15 Moll. 737; Jolly *v.* Young, 1 Esp. 186.

[3] Walls *v.* Bailey, 49 N. Y. 467; Ford *v.* Tirrell, 9 Gray (Mass.), 401; Lowe *v.* Lehman, 15 Ohio St. 179.

[4] Bottomley *v.* Forbes, 5 Bing. (N. C.) 121; Journu *v.* Bordieu, Park on Ins. 245; Mason *v.* Skurry, id. 245; Mackenzie *v.* Dunlop, 3 Macg. (S. C.) 26; Buckle *v.* Knook, 2 L. R. Exchq. 125.

[5] Hazard *v.* N E. Marine Ins. Co., 1 Sum. (U. S.) 218.

fixtures,"[1] "British weight,"[2] "immediate delivery,"[3] "a clear bill of lading,"[4] "warranted to depart with convoy,"[5] "sea litter,"[6] "the tanning business,"[7] "in regular turns of loading,"[8] "after arrival" at a certain place, may be shown to mean at a place at sea, several miles from certain ports, if it be a place of ordinary anchorage.[9] So where by a charter party the ship-owner agreed to consign the ship to A. B., at Calcutta, "on the usual and customary terms," a custom may be proved for consignee to procure the homeward freight on commission ;[10] but where the charter provides that the consignment was to be "free of commission," and says nothing of usual terms, the charterer cannot set up such custom by oral evidence in an action against the ship-owner for not allowing the consignee to procure the homeward freight.[11] "A full and complete cargo of sugar" may be explained to mean full and complete according to the customary mode of packing and loading sugar at the port where it is loaded.[12] "In turn to deliver," may be explained by local usage.[13] So the custom of the port as to when lay days commence.[14] "Fifty tons best palm oil, with a fair allowance for inferior oil, if any," may be explained to be satisfied by the delivery of fifty tons, of which the greater part is inferior.[15] A contract in writing to do stone and brickwork at the rate of "3*s*. per superficial yard of work 9 inches thick, and finding all materials, deducting all lights," was held not to exclude a custom in the trade to reduce all brickwork for the purpose of measurement to 9 inches in

[1] Whitmarsh *v.* Conway F. Ins. Co., 16 Gray (Mass.), 359.

[2] Goddard *v.* Bulver, 1 N. & M. (S. C.) 45.

[3] Nelson *v.* Smith, 36 N. J. L. 148.

[4] Cheny *v.* Holly, 14 Wend. (N. Y.) 26; Barber *v.* Bruce, 3 Conn. 9.

[5] Lethutier's case, 2 Salk. 443.

[6] Sleight *v.* Hartshorne, 2 John. (N. Y.) 531.

[7] Barger *v.* Caldwell, 2 Dana (Ky.), 130.

[8] Schultz *v.* Leidman, 146 C. B. 38.

[9] Lindsay *v.* Jauson, 4 H. & N. 699.

[10] Robertson *v.* Wait, 8 Exch. 299.

[11] Phillips *v.* Briard, 1 H. & N. 21.

[12] Cuthbert *v.* Cumming, 11 Exch. 405.

[13] Leidemann *v.* Schultz, 14 C. B. 318; Robertson *v.* Jackson, 2 C. B. 412.

[14] Norden Steam Co. *v.* Dempsey, 1 C. P. D. 654.

[15] Lucas *v.* Bristow, E. B. & E. 907; 27 L. J., Q. B. 364.

thickness.[1] So a contract to do certain work and to deliver "a weekly account of work done" was held not inconsistent with a usage in the building trade, that this clause related not to all the work contracted to be done, but to that part only which was of a particular kind.[2] Where there was a written contract for the sale of shares at a certain price, "for payment half in two, half in four months," it was held, that evidence was admissible that the seller was by usage not bound to deliver the shares until the appointed time for payment unless the buyer chose to pay for them earlier.[3] The usage of a particular port, that the underwriters are not liable for general average in respect of the jettison of timber stowed on the deck, can be annexed to a policy making the underwriter liable for general average without restriction.[4] By a bill of lading of wool, freight was to be paid "at the rate of 80*s.* per ton of 20 cwt. gross weight, tallow and other goods, grain or seed, in proportion as per London Baltic printed rates;" evidence was admitted to show that by the usage of the trade this meant that 80*s.* per ton of 20 cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured.[5] The question whether a cargo "for shipment in June" was satisfied by a cargo which was loaded half in May and half in June, was held to be a question for the jury.[6] So, on a sale of goods to be paid for in from "six to eight weeks," the question of the length of credit thereby allowed was left to the jury, the words, apart from usage, being insensible.[7]

Sec. 50. Rule when Words have well defined Meaning.

Usage is not admissible to contradict or vary what is plain;[8] therefore, *if the words employed in a written contract or in-*

[1] Symonds *v.* Floyd, 6 C. B., N. S. 691.

[2] Myers *v.* Sarl, 3 E. & E. 306.

[3] Field *v.* Lelean, 6 H. & N. 627, Ex. Ch.

[4] Miller *v.* Tetherington, 6 H. & N. 278; 7 H. & N. 954.

[5] Russian S. Navigation Trading Co. *v.* Silva, 13 C. B., N. S. 610.

[6] Alexander *v.* Vanderzee, L. R., 7 C. P. 530.

[7] Ashford *v.* Redford, L. R., 9 C. P. 20.

[8] Blackett *v.* Royal Exchange Ins. Co., 2 Cr. & J. 249.

strument have a known legal meaning, parol evidence that the parties intended to use them in some different, though popular sense, will not be received, *unless the words, if interpreted according to their strict legal acceptation, are wholly insensible either to the context or to the extrinsic facts.* Thus, if a word denoting weight, measure or number has had a definite meaning attached to it by the legislature, parties using the word in a contract will be conclusively presumed to have used it in that sense, unless the contrary clearly appears from some part of the writing itself,[1] or from proof of a well established usage of the trade or business to which the contract relates.[2] Thus, in the case last cited parol evidence was admitted to show that in a contract for a certain number of "barrels" of petroleum, at so much a gallon, the word "barrel" means a vessel of a certain capacity, and not the statutory measure of quantity, and that for this purpose evidence that petroleum oil is often sold in barrels, and that the barrels are usually of such certain capacity, is competent, as also that the barrels exhibited by the seller at the time of his offer to deliver, some two months after the date of the contract, were of such capacity; also that the purchaser, in all the discussions relating to the delivery, did not suggest that the barrels were not what the contract required, and was ready to receive the barrels if he had considered the oil of the requisite quality. But to be admissible under such circumstances, the usage must be clear, cogent and irresistible.[3] The fact that words of themselves are susceptible of an interpretation apparently consistent with the intention of the parties, does not exclude such proof. If the words are shown to have acquired a well-known technical meaning, that will be taken to be the sense in which they were used. Thus, in replevin for marble retained by the carrier for the costs of transportation, the question in dispute was, whether marble in slabs was wrought or unwrought, the charge for

[1] Henry *v.* Rusk, 1 Dall. (U. S.) 465; Frith *v.* Barker, 2 John. (N. Y.) 335; Stower *v.* Whitman, 6 Binn. (Penn.) 417.

[2] Schiller *v.* Stevens, 100 Mass. 518.

[3] Spicer *v.* Cooper, 1 Q. B. 424; Allegre *v.* Maryland Ins. Co., 2 G. & J. (Md.) 136.

the former being more than for the latter. Evidence being heard, the court instructed the jury "that the terms 'wrought' and 'unwrought,' as applied to marble, are words of doubtful signification, and it was competent for the plaintiff to show what meaning is given to them by custom and usage; that such custom, in order to bind the defendant, need not be universal, settled or uniform among dealers and carriers. If the jury believe from the evidence that the generally prevailing usage among manufacturers, dealers and carriers is to class and consider marble in slabs as unwrought, then the defendant can claim freight on it only as of that class." It was held that the jury were properly instructed.[1]

Whatever the courts may *say* as to the introduction of evidence of a usage that conflicts with the well settled rules of law, it will be found in practice, and by a careful examination of the cases, that the rule exists in theory rather than in practice, and that the rule is really nothing more nor less than that *evidence of a usage that conflicts with a well-settled rule of law must be of such a character as to afford irresistible evidence that the parties knew of and contracted in reference to the usage rather than in reference to the rules of law, and that where nothing more than mere proof of a usage exists, and the parties' knowledge thereof, it will be presumed that the parties contracted in reference to the law rather than the usage.*[2] A contrary rule would overturn a well settled rule that parties may waive the provisions of the common law or a statute even, and contract in direct opposition thereto, unless the statute prohibits such a contract, or it is *malum in se* or opposed to the policy of the law. Therefore there can be no question but that *in all cases where the parties may expressly contract in opposition to the common law or a statute, evidence of a usage may be given to show that the parties contracted in reference to it rather than in reference to the law*, and it is a question of fact for the jury to find whether the parties did or did not intend to adopt the usage instead of

[1] Bancroft *v.* Peters, 4 Mich. 619. 66 id. 429; Miller *v.* Stevens, *ante;*

[2] Adams *v.* Pittsburgh Ins. Co., Overman *v.* Hoboken Bank, 30 N. 76 Penn. St. 411; Jones *v.* Wagner, J. L. 61.

the law.[1] Of course, limitations upon this rule exist, and cases often arise in which the courts will adjudge the usage absolutely void in itself, and it may be said, with absolute certainty, that if that which is sought to be incorporated into the contract by usage would be void, as an express stipulation, the evidence would not be admissible. Therefore a usage *malum in se* or *malum prohibitum*,[2] or which trenches upon the policy of the law, as in restraint of trade,[3] or which is unreasonable, unjust, oppressive, or which sanctions dishonesty, is clearly void,[4] and never could obtain recognition from the courts.

Sec. 51. Usage may add Incidents to Contracts. Illustrations.

The office of a usage is not confined to that class of cases where the written instrument is expressed in ambiguous or technical language, but is also admissible, in many instances, *to add incidents* to the contract, that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which it relates, which are not inconsistent therewith.[5] This species of evidence is admitted upon the principle of presumption that the parties did not mean to express the whole of the contract in writing, but made it in reference to the usage, and in such cases the usage is as much a part of the contract as though it had actually been incorporated therein.[6] A good illustration of this rule is to be found in

[1] Gorden *v.* Little, 8 S. & R. (Penn.) 533; Halsey *v.* Brown, 3 Day (Conn.), 346; Snowden *v.* Warder, 3 Rawle (Penn.), 101; Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 581; Jones *v.* Fales, 4 Mass. 245.

[2] Snowden *v.* Warder, 3 Rawle (Penn.), 107.

[3] Williams *v.* Gilman, 3 Me. 281.

[4] Gallatin *v.* Bradford, 1 Bibb. (Ky.) 209; Whitesides *v.* Meredith, 3 Yeates (Penn.), 318; Kendall *v.* Russell, 5 Dana (Ky.), 501.

[5] Dixon *v.* Dunham, 13 Ill. 324; Thompson *v.* Hamilton, 12 Pick. (Mass.) 425; Cooper *v.* Kane, 19 Wend. (N. Y.) 386; Leach *v.* Beardslee, 22 Conn. 404; Alabama, &c., R. R. Co. *v.* Kidd, 29 Ala. 221.

[6] Palmer *v.* Kane, 5 Wis. 265; Bank of Columbia *v.* Fitzhugh, 1 H. & G. (Md.) 239; Harsh *v.* North, 40 Penn. St. 241 United States *v.* Arrendo, 6 Pet. (U. S.) 715; Stultz *v.* Dicky, 5 Binn. (Penn.) 287; Barber *v.* Bruce, 3 Conn. 9; Sewall *v.* Gibbs, 1 Hall (N. Y.), 612; Ludwick *v.* Ohio Ins. Co., 5 Ohio, 436; Sampson *v.* Gazzam, 6 Port. (Ala.) 123.

the commercial usage, by which grace is allowed upon a note or bill of exchange, payable at a certain time. Thus, a note is made payable in sixty days from date, but commercial usage steps in and postpones the payment for *three* days, making it payable only in *sixty-three* days, and, in cases where this usage applies, it is so effective, that a suit brought or protest made before the lapse of the sixty-three days is entirely inoperative. In these cases the parties are presumed to contract in reference to the law as it exists at the time, and the only difference between taking that and a usage is, that the latter is a binding law on particular persons, places and things; and although there are some exceptions, yet, in many cases, the maxim, *Expressum facit, cessare tacitum*, applies as well to an *incident*, sought to be annexed to a contract by the general law, as by a special custom or usage.[1] So, too, it may be proved by parol that it is the custom of persons employed in particular trades, under a general contract of hiring, to have certain holidays in the year, and Sundays to themselves.[2] So that a tenant by deed is entitled to the away-going crops, although no such right is reserved in the deed.[3]

This rule, however, as well as in all instances in which evidence of usage is received, is subject to the qualification that *the evidence must not be inconsistent with or repugnant to the contract;* for otherwise it would not go to interpret, but to contradict what is written.[4] In order to establish an inconsistency between the written agreement and the usage or custom, it is not necessary that the former should, in express terms, exclude the latter, but if it can be collected from the

[1] Cherry *v.* Holly, 14 Wend. (N. Y.) 26; Avery *v.* Stewart, 2 Conn. 69; Dana *v.* Fulden, 1 E. D. S (N. Y. C. P.) 463; Lawrence *v.* McGregor, 37 Penn. St. 192; Boorman *v.* Johnson, 12 Wend. (N. Y.) 566; Wilcox *v.* Wood, 9 id. 349; Daggett *v.* Snowden, 2 Black. (U. S.) 225; Crosby *v.* Wyatt, 23 Me. 156; Fox *v.* Parker, 44 Barb. (N. Y.) 541; Foley *v.* Mason, 6 Md. 37.

[2] Rex *v.* Stoke-upon-Trent, 5 Q. B. 303.

[3] Wigglesworth *v.* Dallison, 1 Doug. 210; Senior *v.* Armitage, Hatt. 197; Hutton *v.* Warren, 1 M. & W. 466.

[4] Trueman *v.* Loder, 11 Ad. & El. 589; Holding *v.* Pigatt, 7 Bing 465; Yates *v.* Pym, 6 Taunt. 446; Clarke *v.* Rayston, 13 M. & W. 752.

whole instrument, either expressly or impliedly, that the parties did not mean to be governed by the usage, no evidence respecting it can be received.[1] *Prima facie* every contract is to be understood as containing, in some sort, an implied reference to the general law; but when a state of facts is made out, which rebuts that presumption, and shows that the parties intended to adopt a particular usage as the rule of interpretation, the latter will prevail, provided it is such a usage as the parties had a right to adopt. But it is obvious, that *where the contract itself manifests an intention, either directly or indirectly, to exclude the usage*, no evidence of it can be received, without overstepping the limits of exposition. A custom or usage of trade is only allowable as one mean to arrive at the intention, never to thwart or control it. If the stipulations of a contract indicate an *intention* in the obligor, variant from the usage, then the stipulations should prevail; otherwise, an obligation may be imposed contrary to the intention, though provided against by the express terms of the contract.[2] What will be deemed such an expression of intention, inconsistent with the usage, as to exclude the latter, is many times a question of considerable difficulty. The general rule is clear; no extrinsic evidence of usage can be received to vary, add to, or contradict the plain sense of the contract, when once properly ascertained.[3] But the application of it depends so much upon particular forms of expression, and terms in the contract, which may happen to strike different minds in different ways, as well as upon various collateral and extrinsic circumstances, that it is not extraordinary to find learned judges disagreeing somewhat on this point. That disagreement, as we have

Hutton *v.* Warren, 1 M. & W. 477; Webb *v.* Plummer, 2 B. & Ad. 746.

[2] Kendall *v.* Russell, 5 Dana (Ky.), 501, 502. See *per* STORY, J., in Schooner Reeside, 2 Sum. (U. S.) 570.

[3] Mumford *v.* Hallett, 1 John. (N. Y.) 439; Rankin *v.* The American Ins. Co., 1 Hall (N. Y.), 619; The Schooner Reeside, 2 Sum. (U. S.) 56; Turney *v.* Wilson, 7 Yerg. (Tenn.) 540; Stoever *v.* Whitman, 6 Binn. (Penn.) 516; Turner *v.* Burrows, 5 Wend. (N. Y.) 541, 547; Parsons *v.* Miller, 15 id. 562; Snowden *v.* Warder, 3 Rawle (Penn), 107; Yeates *v.* Pim, 2 Marsh. (Ky.) 141; Blackett *v.* Royal Exchange Ins. Co., 2 Cr. & J. 244.

seen, is most strikingly apparent in those cases where usage has been invoked to supersede some rule of general law. Then the presumption that the parties contracted in reference to the general law, must be overcome, before the usage can be applied; and very slight indications of intent, appearing in the instrument, have been seized upon as corroborating that presumption, to the extent of excluding the usage altogether. There are various usages of trade and commerce, which have been so often proved as matters of fact, and have so far incorporated themselves with the general law, that courts will judicially recognize them.[1] But particular usages, such as those of which we have been speaking, must be proved specially. And the circumstances of the usage being *prima facie* "unreasonable," "against the general law," "restricted within very narrow limits," of comparatively "recent origin," etc., etc., always come in to enhance the difficulty of showing that the parties contracted in reference to it, and intended to make it the law of their case.[2] And perhaps this is the sense in which many cases are to be understood, which lay down the proposition that *a usage, to be obligatory, must be certain, uniform, reasonable, and sufficiently ancient to be generally known.*[3]

When the question is of a custom or usage, and it is not known to those who, from their business and connections, have the best means of knowing it, ignorance of it is, in some sense, positive testimony of its non-existence. Thus, suppose the question to be as to the existence of a usage of trade in a foreign port, according to which the rights of parties are to be decided, and that there are two foreign witnesses, both merchants belonging to the place and dealing in

[1] Consequa *v.* Willings, 1 Pet. (U. S. C. C.) 230; Snowden *v.* Warder, 3 Rawle, 105; Wilcox *v.* Wood, 9 Wend. (N. Y.) 349; United States *v.* Horrendo, 6 Pet. (U. S.) 715; Thomas *v.* O'Hara, 1 Const. Ct. (S. C.) 306.

[2] Gibson *v.* Culver, 17 Wend. (N. Y.) 307; Wilcox *v.* Wood, 9 id. 349; Middleton *v.* Heyward, 2 N. & McC. (S. C.) 9; Gordon *v.* Little, 8 S. & R. 535; Eager *v.* Atlas Ins. Co., 14 Pick. (Mass.) 143, 4; Snowden *v.* Warder, 3 Rawle (N. Y.), 105; Thomas *v.* O'Hara, 1 R. Const. Ct. (S. C.) 306; Furnis *v.* Hone, 8 Wend. (N. Y.) 266; Allegre *v.* The Maryland Ins. Co., 2 G. & J. (Md.) 136.

[3] Kendall *v.* Russell, 5 Dana (Ky.), 501.

the same business, one of whom testifies in support of the usage, and the other is ignorant of it, in such case it seems the usage cannot be said to be proved, especially if other merchants from the place are in court and not called on.[1] So, too, the fact that a usage has been resisted by some, and those insisting upon it or others of the same class consenting to a qualification or abandonment of it in consequence of such resistance, is quite material on the general inquiry.[2] There is a distinction between inquiring of a witness for the common understanding as to the import and effect of a contract susceptible of a clear interpretation, and an inquiry merely as to the custom or usage relating to such contract. The former would be inadmissible, and the latter is admissible, if at all, as a means of interpreting the sense in which the parties understood the language, while the former only shows the understanding of others, which is immaterial, *unless it was also the understanding of the parties.*[3]

Sec. 52. Rule when Ambiguity is Created by Parol Proof.

There is a class of cases, as we have seen, where evidence of usage is admissible to put a construction upon a contract, in which there is no ambiguity upon its face, but where an ambiguity is created by extrinsic evidence. This results from the circumstance that, in the ever varying and changing pursuits of mankind, new terms are being devised, among mechanics, manufacturers and professional men, which, although they may have a well understood meaning in ordinary transactions, yet have a peculiar and entirely different meaning in the trade or business to which they relate, and there can be no rational objection to the admission of parol evidence of persons conversant with their technical meaning,

[1] Parrott *v.* Thatcher, 9 Pick. (Mass.) 420.

[2] Kendall *v.* Russell, *ante.*

[3] Paull *v.* Lewis, 4 Watts (Penn.), 402; Houghton *v.* Gilbert, 7 C. & P. 701. In this case the question was as to the meaning of the word "cargo," in reference to a ship, and whether it included the whole loading. The counsel was proceeding to read from Entick's Dictionary when TINDAL, C. J., stopped him and said: "It is a question of mercantile construction, you had better lay aside your dictionary and appeal to the knowledge of the jury, for, after all, the dictionary is not authority."

to explain them,[1] and, although there are a class of cases which hold that this should not be permitted, where the usage conflicts with a statutory definition,[2] yet the present drift of authority is the other way, where the usage is not *malum prohibitum*. If the usage is inconsistent with the contract, or expressly or by necessary inference contradicts it, it cannot be received in evidence to explain it,[3] because in such a case the effect of the usage would be to thwart, rather than effectuate the intention of the parties,[4] and a usage is never admissible to change the legal relation of the parties, or defeat their intention.[5]

[1] Sleight *v.* Hartshorn, 2 John. (N. Y.) 542; Miller *v.* Stevens, 100 Mass. 518.

[2] Evans *v.* Myers, 25 Penn. St. 114; Green *v.* Moffatt, 22 Mo. 529.

[3] Thompson *v.* Ashton, 14 John. (N. Y.) 417; Robinson *v.* United States, 13 Wall. (U. S.) 365; Dickinson *v.* Gray, 7 Allen (Mass.), 9; Wetherell *v.* Neilson, 20 Penn. St. 448; Frith *v.* Barker, 2 John. (N. Y.) 327; Coxe *v.* Heisley, 19 Penn. St. 243.

[4] Clark *v.* Raystour, 13 M. & W. 752; Willtshear *v.* Cottrell, 1 E. & B. 674.

[5] Duguid *v.* Edwards, 50 Barb. (N. Y.) 288; Lawrence *v.* Maxwell, 6 Lans. (N. Y.) 469; Woodruff *v.* National Bank, 25 Wend. (N. Y.) 674.

CHAPTER III.

PRESUMPTIONS.

SECTION.

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81. As to Title.
82. Miscellaneous Presumptions.

Sec. 53. Kinds of.

Presumptions are divided into two classes, *presumptions of law* and *presumptions of fact*. Presumptions of law are said to consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry, and are founded upon either the laws of nature or the experienced course of

human conduct and affairs, and the connection *usually* found to exist between certain things, and are not peculiar to the law, but are shared in common with other sciences. Thus the presumption of a malicious intent to kill, from the deliberate use of deadly weapons, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed, and it is this uniformly experienced connection which leads to its recognition by the law, without other proof; the force of the presumption being strong or weak in proportion to the universality of its experience. This class of presumptions are divided into two classes, *conclusive* and *disputable*.

Sec. 54. Conclusive Presumptions, what are.

Conclusive, or, as they are sometimes called, imperative or absolute presumptions of law *are rules determining the quantity of evidence requisite to support any particular averment which is not permitted to be overcome by any proof that the fact is otherwise.* They consist chiefly of those cases in which the long-experienced connection before alluded to has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal, and they have been taken by common consent, from motives of public policy, for the sake of greater certainty and the promotion of peace and quiet in the community; and for this reason all corroborative proof is dispensed with and all opposition forbidden.[1]

Belonging to this class of presumptions are those arising under statutes, as of payment, under the Statute of Limitations, after the lapse of the statutory period; or of a grant, after the requisite user, of a right or possession of lands, etc. But by far the larger class of this species of presumptions arise under the common law; as, that *every person above the age of fourteen years is acquainted with the law*;[2] also *that*

[1] Taylor on Ev. 64, 65.

[2] 1 Hale, 42; Rex *v.* Esop, 7 C. & P. 456.

every sane person is conclusively presumed to contemplate the natural and probable consequences of his acts, and this rule prevails both in criminal[1] and in civil cases.[2] So also conclusive presumptions are raised that the records of courts have been correctly made ;[3] that a party to the record was interested in the suit ;[4] that all the facts essential to sustain a verdict were found, although not stated in the record.[5] So, too, after twenty years it will be presumed in favor of all judicial tribunals that all persons concerned had due notice of its proceedings.[6] So, also, it is conclusively presumed that a principal is possessed of knowledge of all facts relating to a transaction which his agent acquired while engaged in it for the principal.[7] So, too, the law conclusively presumes in favor of legitimacy, unless it is shown that the husband and wife did not cohabit, or that he was impotent ;[8] and the proof of non-access or impotency must be irresistible, even though the parties are living apart,[9] or the woman is living in notorious adultery.[10] But while the parties are divorced *a mensa et thoro*, children born during separation are presumed to be illegitimate.[11] So, too, an infant under the age of seven years is conclusively presumed to be incapable of committing a crime for want of discretion ;[12] and under fourteen years, a male infant is presumed, on the ground of impoteney, to be incapable of committing rape,[13] or even of committing an assault with intent to commit a rape.[14] A female under ten

[1] Rex *v.* Hunt, 1 Moo. C. C. 93 ; Rex *v.* Dixon, 3 M. & S. 15 ; Rex *v.* Jones, 9 C. & P. 260.

[2] Haine *v.* Wilson, 9 B. & C. 643 ; Baylis *v.* Lawrence, 11 Ad. & El. 925 ; Pontifex *v.* Bignold, 3 M. & G. 63 ; Tapp *v.* Lee, 3 B. & P. 371 ; Foster *v.* Charles, 6 Bing. 396.

[3] Reed *v.* Jackson, 1 East, 355.

[4] Stein *v.* Bowman, 13 Pet. (U. S.) 309.

[5] Jackson *v.* Pecked, 1 M. & S. 237 ; Harris *v.* Goodwyn, 2 M. & G. 405 ; Spieres *v.* Parker, 1 T. R. 141 ; Davis *v.* Black, 1 Q. B. 911.

[6] Brown *v.* Wood, 17 Mass. 68 ; Ferrer's Case, 6 Coke, 7.

[7] Fairfield Savings Bank *v.* Chase, 72 Me. 226 ; Willey *v.* Knight, 27 Ala. 336.

[8] Cope *v.* Cope, 1 M. & R. 269 ; Morris *v.* Davies, 3 C. & P. 215.

[9] Cope *v.* Cope, *ante*.

[10] Rex *v.* Mansfield, 1 Q. B. 444.

[11] St. George *v* St. Margaret, 1 Salk. 123.

[12] 1 Hale, 147 ; 4 Bl. Com. 23.

[13] Rex *v.* Jordan, 9 C. & P. 118 ; 1 Hale, 630 ; Rex *v.* Groombridge, 7 C. &. P. 582.

[14] Rex *v.* Phillips, 8 C. & P. 736 ; Rex *v.* Eldershaw, 3 id. 396.

years of age is presumed to be incapable of consenting to sexual intercourse.[1] So, after the lapse of thirty years, it will be presumed that executors and other officers, selling lands as such, observed all the necessary legal formalities.[2] But this presumption does not extend beyond the intermediate proceedings. The license to sell, as well as the official character, being matters of record, should generally be proved.[3] Nor does this presumption extend to records and public documents which are supposed always to remain in the custody of certain officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for by secondary evidence;[4] nor in cases of prescription.[5] The same principle applies to the proof of the execution of wills and ancient deeds, and where these instruments are thirty years old and free from any alterations, they prove themselves; the bare production thereof is sufficient, as the subscribing witnesses are presumed to be dead; and the rule is not changed, even though it is shown that the witnesses are living,[6] or even actually in court;[7] nor, in the case of wills, by showing that the testator died within the thirty years.[8] But it must be shown that the instrument comes from such custody as, though not strictly proper in point of law, is sufficient to raise a reasonable presumption of its genuineness,[9] and is otherwise free from suspicion.[10] The same rule extends to letters,[11] certificates,[12] receipts,[13] and all other written documents, and if the conditions before stated exist, neither the signature nor handwriting need be proved.[14] It is questionable whether this rule applies to an instrument

[1] 1 Rugs, C. & M. 693.

[2] Colman *v.* Anderson, 10 Mass. 105; Society, &c., *v.* Wheeler, 1 N. H. 310; Pejepscot *v.* Ransom, 14 Mass. 145.

[3] 2 Ersk. Inst. 783.

[4] Hathaway *v.* Clark, 5 Pick. (Mass.) 490; Brunswick *v.* M'Kean, 4 Me. 508.

[5] Mayor of Kingston *v.* Horner, 1 Camp. 215; Eldredge *v.* Knatt, 1 id. 215.

[6] Doe *v.* Burdett, 4 Ad. & El. 19.

[7] Marsh *v.* Colnett, 2 Esp. 666.

[8] Doe *v.* Wooley, 8 B. & C. 22.

[9] Meath *v.* Winchester, 3 Bing. (N. C.) 200; Doe *v.* Samples, 8 Ad. & El. 151.

[10] Roe *v.* Rawlings, 7 East, 291.

[11] Bere *v.* Ward, 2 Ph. Ev. 204; Doe *v.* Buyon, 12 Ad. & El. 431.

[12] Rex *v.* Ryton, 5 T. R. 259.

[13] Bertie *v.* Beaumont, 2 Price, 308.

[14] Wynne *v.* Tyrwhitt, 4 B. & Ad. 377.

bearing the seal of a court or of a corporation, "because," as was said by LORD TENTERDEN,[1] "although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for after such a lapse of time, yet the seals of courts and of corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed."

Sec. 55. Estoppels as Presumptions.

So, too, estoppels are ranked with conclusive presumptions, and are divided into three classes: estoppels by deed, by record, and *in pais*.[2] Estoppels by deed and by record will be discussed under their respective heads. A man is said to be estopped when he has done or permitted some act which the policy of the law will not permit him to gainsay or deny; and although it is sometimes said that estoppels are odious, yet, they are generally neither unjust nor absurd, but founded upon the plainest principles of equity and morality,[3] and their foundation is laid in the obligation which every man is under, to speak and act according to the truth of the case, and in the policy of the law to prevent the mischiefs which would result from uncertainty, confusion and want of confidence in the intercourse of men if they were permitted to deny that which they have deliberately and solemnly asserted and received as true. But this doctrine is guarded with great strictness, and to be operative *must* be precise and clear and certain to every intent,[4] and mutual.[5]

Sec. 56. Upon Whom Binding.

They are only binding upon the parties and their privies, and can only be taken advantage of by those who are bound

[1] In Rex *v.* Bothwick, 2 B. & Ad. 648.

[2] Co. Litt. 352*a*.

[3] TAUNTON, J., in Bowman *v.* Taylor, 2 Ad. & El. 291.

[4] Carner *v.* Jackson, 4 Pet. (U. S.) 83; and not dependent upon doubtful inference. Rich *v.* Atwater, 16 Conn. 409; Lajoye *v.* Primm, 3 Mo. 529; Balling *v.* Mayor, 3 Rand. (Va.) 563.

[5] Lansing *v.* Montgomery, 2 John. (N. Y.) 382; Schumann *v.* Garratt, 16 Cal. 100; Longwell *v.* Bentley, 3 Grant (Penn.) Cas. 177.

by them.[1] Corporations are bound by them as well as individuals.[2] But it does not apply to the sovereign,[3] although it has been held that a State may be estopped by the acts of its legislature,[4] and a resolve of the legislature, fixing the boundaries of certain lands, has been held sufficient to estop the State from denying them.[5] And where the State has granted lands to an alien, it has been held to be estopped by its own deed from setting up the alienage of the grantee in avoidance of its deed.[6]

Sec. 57. Estoppel against an Estoppel, Effect of; How may be made Available.

An estoppel against an estoppel sets the matter at large,[7] and if evidence is offered of facts which the party is estopped from proving, and no objection is made, the estoppel is waived.[8] A party relying on an estoppel must plead it *if he has an opportunity to do so*, otherwise it may be given in evidence under the general issue.[9] And if a party neglects to take advantage of an estoppel by plea or demurrer when he has an opportunity to do so, the estoppel is deemed to be waived.[10]

[1] Griggs *v.* Smith, 12 N. J. L. 22; Griffen *v.* Richardson, 11 Ired. (N. C.) L. 439; Langer *v.* Fitton, 1 Rawle (Penn.), 141; Williams *v.* Chandler, 25 Tex. 4; Worcester *v.* Green, 2 Pick. (Mass.) 425. That is, privies in blood, by estate and in law. Co. Litt. 352 *a*; Measure *v.* Noble, 11 Ill. 531; Miles *v.* Miles, 8 W. & S. (Penn.) 135; Deevy *v.* Cray, 5 Wall. (U. S.) 795; Nutwell *v.* Tongue, 22 Md. 419; Langston *v.* McKinne, 2 Murph. (N. C.) 67.

[2] Selma, &c., R. R. Co. *v.* Tipton, 5 Ala. 787; Hale *v.* Union M. F. Ins. Co., 32 N. H. 295; Little Rock & Napoleon R. R. Co. *v.* Little Rock & Miss. R. R. Co., 36 Ark. 663.

[3] Taylor *v.* Shuford, 4 Hawkes (N. C.), 116; Wallace *v.* Maxwell, 10 Ired. (N. C.) L. 110; Johnson *v.* United States, 5 Mas. (U. S.) 525.

[4] Enfield *v.* Permit, 5 N. H. 280.

[5] Com *v.* Pejepscot, 10 Mass. 155.

[6] Com. *v.* Audre, 3 Pick. (Mass.) 324.

[7] Carpenter *v.* Thompson, 3 N. H. 204; Dausen *v.* Johnson, 13 N. J. L. 264.

[8] Hanson *v.* Buckney, 4 Dana (Ky.), 251.

[9] Howard *v.* Mitchell, 14 Mass. 241; Lord *v.* Bigelow, 8 Vt. 461; Isaacs *v.* Clark, 12 Vt. 692; McMair *v.* O'Fallow, 8 Mo. 188; Woodhaven *v.* Williams, 3 Dev. (N. C.) L. 508.

[10] Brinsmaid *v.* Mage, 9 Vt. 31; Burdet *v.* Burdet, 2 A. & R. Mar. (Ky.) 143; Keel *v.* Ogden, 3 Dana (Ky.), 103.

Sec. 58. Estoppels in pais. Equitable Estoppels.

Estoppels *in pais* are those which are not included in those by deed or record, whether they appear upon the face of a written instrument, or result from some act or omission of the party, inducing another party to act upon the faith of such acts or omissions to act, so as injuriously to affect his previous position.[1] Thus, if the maker of a note declares it to be "good" to a person who is about to purchase it, or stands by in silence when it is about to be transferred to a third person, he is thereby estopped from setting up any defense to the note which existed at that time, of which he was, or ought to have been, cognizant.[2] So it has been held that a mortgagor, who represents to a person who is about to take an assignment of it, that it is "all right," is estopped thereby from setting up the defense of usury, or denying the amount stated to be due thereon, in its inception.[3] So where property is by the owner put into the hands of a third person to be sold as his own, the real owner is estopped from setting up his ownership thereof to the prejudice of a purchaser from such third person, and, it seems, against a creditor of such third person who has attached it upon the faith of a representation to him, by such third person, that

Roe *v.* Jerome, 18 Conn. 138; White *v.* Langdon, 30 Vt. 599; Allen *v.* Winston, 1 Rand. (Va.) 65; Laski *v.* Goodman, 18 La. An. 294; Bowen *v.* Buck, 28 Vt. 308; Preston *v.* Mann, 25 Conn. 118; Garrison *v.* Garrison, 29 N. J. L. 153; Forsyth *v.* Day, 46 Me. 176; Wyman *v.* Perkins, 39 N. H. 218; Cook *v.* Finkler, 9 Mich. 131; Rigney *v.* Smith, 39 Barb. (N. Y.) 383; Cocke *v.* Kuykendall, 41 Miss. 65; Reigard *v.* McNiel, 38 Ill. 400; Brown *v.* Wright, 17 Ark. 9; Crout *v.* De Wolf, 1 R. I. 393.

[2] Watson *v.* McLaren, 19 Wend. (N. Y.) 557; Crout *v.* De Wolf, 1 R. I. 393; Cloud *v.* Whiting, 38 Ala. 57; Drake *v.* Foster, 28 id. 649; Power *v.* Pinkerton, 1 E. D. S. (N. Y. C. P.) 30; Preston *v.* Mann, 25 Conn. 118; Vanderpool *v.* Blake, 28 Ind. 130; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309; Smith *v.* Stone, 17 B. Mon. (Ky.) 168; Reed *v.* Vancleeve, 27 N. J. L. 352; Bliss *v.* Rollins, 6 Vt. 529. So, if a note is made payable at a particular bank, the maker is thereby estopped from denying the existence of such bank. Hall *v.* Harris, 16 Ind. 180; Depeur *v.* Bank of Limestone, 1 J. J. Mar. (Ky.) 378. So, if he gives a note payable to a particular corporation, he is estopped from denying that there is such a corporation. Congregational Society *v.* Perry, 6 N. H. 164.

[3] Cary *v.* Wheeler, 14 Wis. 281; Man *v.* Howland, 20 Wis. 282; Smith *v.* Newton, 38 Ill. 230.

the property was his.[1] But it must be remembered that no estoppel in relation to *real estate* can be created by *verbal* contracts or admissions.[2] Enough has been said to illustrate generally what amounts to an estoppel *in pais*, and to show what must be proved to establish such an estoppel, *to wit:* 1st. That the party sought to be estopped made the representation or admission, or did the act, or omitted to do it, upon which the estoppel is based. 2d. That the party setting up the estoppel was induced to act, or to omit to act, upon the faith of such matters,[3] and, either that the party sought to be estopped *intended to mislead the other, or was guilty of such culpable negligence as may be regarded as amounting to an intention to mislead.*[4]

So, too, it must appear that the party seeking to avail himself of the estoppel is himself bound to the exercise of good faith, and must show that he acted promptly, influenced by a belief in the truth of the matter represented, and will be prejudiced if the representations are allowed to be disputed. The act must be the immediate or proximate result of the representation, as, unless induced by belief therein to alter his position, the opposite party cannot be concluded from averring a different state of affairs. The first act, after hearing the words or witnessing the conduct upon which the alleged estoppel is founded, is the test of the party's belief in the truth of the representation; and when the act evinces a disbelief, no estoppel can thereafter be claimed.[5] It must also appear that the person sought to be estopped had legal capacity to contract; consequently an infant, or married woman,[6] are not at law estopped, except as to matters relative to which they can make a binding contract.[7]

[1] Drew *v.* Kimball, 48 N. H. 282.

[2] Gerrish *v.* Proprietors of Union Wharf, 26 Me. 384; Hamlin *v.* Hamlin, 19 id. 141.

[3] Helser *v.* McGrath, 52 Penn. St. 531; Austin *v.* Thompson, 45 N. H. 113; Morton *v.* Hodgdon, 32 Me. 127; Morrison *v.* Weaver, 16 Ind. 344; Windle *v.* County, 21 id. 248.

[4] Taylor *v.* Ely, 25 Conn. 250; Combs *v.* Cooper, 5 Minn. 254; Morrison *v.* Weaver, *ante;* Steele *v.* Putney, 15 Me. 327.

[5] Andrews *v.* Ætna Life Ins. Co., 85 N. Y. 334.

[6] Innis *v.* Templeton, 95 Penn. St. 264.

[7] See Patterson *v.* Lawrence, 90 Ill. 194; 32 Am. Rep. 22, as to the rule in equity where the acts amount to fraud.

Sec. 59. Disputable Presumptions of Law.

Disputable presumptions, like the former, are founded upon the general experience of mankind of a connection between certain facts or things, and the production of certain results therefrom. But, while in the case of the former, the connection is supposed to be invariable, yet in the latter, while the connection is *usually* invariable, yet, it is not always so, therefore while, if there is no proof to the contrary, courts will act upon it, yet it is open to proof that in a particular case, the connection does not exist and therefore the presumption fails. Thus, it is, in all criminal cases because people do not generally commit crimes, it is presumed that a person charged with a crime, is innocent, but, as human experience has demonstrated that this is not always the case, proof is admissible to overcome the presumption, and from this arises the invariable rule that a person charged with a crime, is presumed to be innocent until proved to be guilty. So, too, it is presumed that a bond, mortgage or specialty of any description is paid, after the lapse of twenty years from the date of its maturity, but this is a mere presumption of fact which may be overcome by proof that payment thereof has not in fact been made, because experience demonstrates that people do not always enforce their rights on the one hand, or discharge their obligations upon the other, within that period. And generally, where, from a given state of facts, certain results *usually* ensue, it will be presumed that they do ensue ; but this class of presumptions are only *prima facie*, in other words presumptions of fact, which may always, if possible, be overcome by proof that in the particular case they did not ensue.

Sec. 60. Presumption arising from Possession of Lands.

As men usually own the property they possess, mere proof of possession is *prima facie* proof of ownership,[1] and this applies both to personal and real estate, and possession of the latter raises a presumption of a seizin in fee,[2] and in the case

[1] Webb *v.* Fox, 7 T. R. 397; Sulton *v.* Buck, 2 Taunt. 302; Robertson *v.* French, 4 East, 130.

[2] Jayne *v.* Price, 5 Taunt. 326; Doe *v.* Coulthred, 7 Ad. & El. 239; Doe *v.* Penfield, 8 C. & P. 537.

of a mere trespasser this presumption is conclusive.[1] And in ejectment, although it is an inflexible rule that the plaintiff must recover by the strength of his own superior title, yet proof of possession of the land, for however short a time, is *prima facie* evidence of title against a wrong-doer,[2] provided the plaintiff had possession at the very time when the disturbance occurred, and that he has suffered a real disturbance either in fact or at law.[3] Thus, in an English case,[4] the lessor of the plaintiff proved that he had formerly held possession for over twenty-three years, and during that time had received and increased the rent, and it was held that the defendant could not rebut the presumption of a seizin in fee arising from these unequivocal acts of ownership, by showing that he, himself, had subsequently been in possession for a period *less* than twenty years, for the presumption being thus met by a presumption, the defendant was bound to establish a title of a higher description or the plaintiff's title must prevail. In some cases, it is held that it will be presumed that the fee simple of the land will carry with it the minerals,[5] but this presumption is not universal, because, in mining districts, the right to the minerals and the fee simple to the soil are in different persons; consequently this presumption may be rebutted by showing either an absence of enjoyment of the minerals by the owner of the soil, or an actual use of the minerals by a stranger.[6] The value of the presumption of title arising from possession, depends largely

[1] Elliott *v.* Kemp, 7 M. & W. 312.

[2] Hoey *v.* Furman, 1 Penn. St. 295; Asher *v.* Whitelock, L. R., 1 Q. B. 1; Doe *v.* Dyehall, 3 C. & P. 610; Hutchinson *v.* Perley, 4 Cal. 93. But the possession must be actual, Bord *v.* Rollings, 30 Cal. 408, and must be clearly defined so as to give the possessor exclusive possession. A mere *scrambling* possession is not sufficient. Page *v.* O'Brien, 36 Cal. 559. The rule may be said to be that a prior possession of less than twenty years will prevail against a subsequent possession for less than twenty years. Crockett *v.* Morrison, 11 Mo. 3; Smoat *v.* Lecolt, 1 Stew. (Ala.) 590; Den *v.* Simmickson, 9 N. J. L. 149; Jackson *v.* Harder, 4 John. (N. Y.) 202; Watkins *v.* Woolfalk, 5 Ga. 261.

[3] Lane *v.* Gould, 10 Barb. (N. Y.) 254; Millard *v.* Richard, 13 La. An. 572; Owen *v.* Fowler, 24 Cal. 192.

[4] Doe *v.* Coake, 7 Bing. 346.

[5] Hodkinson *v.* Fletcher, 3 Doug. 31. So also as to the subjacent strata. Keyse *v.* Powell, 2 E. & B. 132; Smith *v.* Lloyd, 9 Exch. 562.

[6] Rome *v.* Grenfel, Ry. & M. 396; Rome *v.* Brenton, 8 B. & C. 737.

by proof of uninterrupted enjoyment *for a long time*, and in one case eight years [1] and in another seven years [2] were held sufficient. Where, however, the plaintiff relies upon a title by adverse possession, nothing short of an uninterrupted adverse occupancy for the entire statutory period will suffice ;[3] but when, as he may do, he rests his case upon the common law presumption, or a lost grant, a possession for a period less than that fixed by statute will, when coupled with other circumstances, warrant a verdict in his favor.[4] And, generally, where rights have been peaceably exercised in a particular manner for a long time, it is only reasonable to presume that they had a legal origin.[5]

In an action for an injury to a reversion, proof of a receipt of the rent of the premises by the plaintiff, will, unless the annual sum is so small as to raise the presumption that it is a mere quit rent, be sufficient evidence of his title to the reversion, except as against the *real owner* and those claiming under him.[6]

Sec. 61. Presumption as to Title to Personal Property from Possession.

It is well settled that prior actual possession of chattels, *without title*, is good as against a trespasser who has no better right ;[7] and in an action either of trover or trespass for chattels, it is sufficient if the plaintiff, as against the defendant, has the better right to the possession of the property, although he has no actual title thereto,[8] as in this class of actions the right to recover depends upon the *right to the*

[1] Jackson *v.* Harder, 4 John. (N. Y.) 202.

[2] Watkins *v.* Woolfalks, 5 Ga. 261.

[3] Lame *v.* Carpenter, 6 Exch. 825 ; Eldredge *v.* Knott, 1 Cowp. 214.

[4] Hunmer *v.* Chance, 4 DeG., J. & S. 625 ; Bright *v.* Walker, 1 C., M. & R. 222.

[5] Rex *v.* Powell, 3 E. & B. 377 ; Mayor of Hull *v.* Horner, 1 Camp. 110.

[6] Daintry *v.* Bracklehurst, 3 Exch. 207 ; Doe *v.* Johnson, Gaw. 173 ; Reynolds *v.* Reynolds, 12 Ir. Eq. 172.

[7] Knapp *v.* Winchester, 11 Vt. 351 ; Cook *v.* Patterson, 35 Ala. 102; Coffin *v.* Anderson, 4 Blackf. (Ind.) 395 ; Carter *v.* Bennett, 4 Fla. 283.

[8] Jones *v.* Sinclair, 2 N. H. 319 ; Burton *v.* Taunchill, 6 Blackf. (Ind.) 470 ; Fairbanks *v.* Phelps, 22 Pick. (Mass.) 535 ; Grady *v.* Newby, 6 Blackf. (Ind.) 442.

possession at the time of conversion.[1] But as these matters will be treated under the head of *Conversion and Trespass*, it will not be advisable to pursue the matter further in this place.

Sec. 62. Continuance of Fact.

A state of relations between parties once proved to exist, is presumed to continue until the contrary is shown;[2] and if these relations are shown to have existed under certain conditions, they are presumed to exist under the same conditions.[3] Thus, while it will not be presumed that a woman is married yet, when her coverture is once established, it will be presumed to continue until the contrary is shown.[4] So if a person is shown to have entered into the service of another under a certain contract, it will be presumed that all future services are continued under such contract, however long continued, unless a new contract is shown to have been subsequently made,[5] and he must sue upon the contract and not upon a *quantum meruit*.[6]

So generally, where a state of affairs or of matters of fact are shown once to have existed, the presumption is that they still exist.[7] Thus, if a vessel is proved to have been seaworthy when a policy attached thereto, it will be presumed that she continued so during the whole time of the risk.[8] So if a state of war in a certain country is shown to have

[1] Clark *v.* Draper, 19 N. H. 419; Ames *v.* Palmer, 42 Me. 197; Caldwell *v.* Cowan, 9 Yerg. (Tenn.) 262.

[2] Eames *v.* Eames, 41 N. H. 177; Hood *v.* Hood, 2 Grant's Cas. (Penn.) 229; Montgomery Plank Road Co. *v.* Webb, 27 Ala. 618; Mullin *v.* Pryor, 12 Mo. 307; People *v.* McLeod, 1 Hill (N. Y.), 377.

[3] Gelston *v.* Hoyt, 1 John. (N.Y.) Ch. 543.

[4] Erskine *v.* Davis, 25 Ill. 251.

[5] Edrington *v.* Leach, 34 Tex. 285; Wood's Master and Servant, 192; Vail *v.* Jersey Little Falls M'f'g Co., 32 Barb. (N. Y.) 564; Nicholson *v.* Patchin, 5 Cal. 474; Wallace *v.* Floyd, 29 Penn. St. 184; Ranck *v.* Albright, 36 id. 367.

[6] Nicholson *v.* Patchin, *ante*.

[7] Fan *v.* Payne, 40 Vt. 615; Bell *v.* Young, 1 Grant's Cas. (Penn.) 175; Brown *v.* Burnham, 28 Me. 38; O'Niel *v.* New York, &c., Mining Co., 3 Nev. 141; Brown *v.* King, 5 Met. (Mass.) 173.

[8] Wright *v.* Orient, &c., Ins. Co., 6 Bos. (N. Y.) 269; Martin *v.* Fishing Ins. Co., 20 Pick. (Mass.) 389.

existed three years ago, it will be presumed still to exist;[1] or if a person is proved to have been insane at a former period, it will be presumed that he continues so,[2] unless it is shown that such insanity was produced by some violent disease.[3] So if a decree in chancery is shown to have been made, it will be presumed that it continued in force unless it is shown to have been annulled, reversed or set aside.[4] So where a partnership, agency, tenancy, or other similar relation is shown to have once existed, it will be presumed to continue until it is proved to have been dissolved,[5] and it is upon this principle that, where a person is shown to have permitted a servant or mistress to order goods upon his credit *upon several occasions*, he will be liable for goods so ordered after the relation has in fact been terminated, unless notice to the tradesman not to furnish them upon his credit has been given.[6] So where a certain custom was found to have existed in 1689, it was held that it would be presumed that it existed in 1840.[7] So, where an infant son is shown to have resided with his parents, it will be presumed that he continued unemancipated, as in the days of his infancy, although he long since arrived at manhood, unless there is some evidence to rebut this presumption;[8] and in an action to cancel a deed

[1] Covert *v.* Gray, 34 How. Pr. (N. Y.) 450.

[2] Sprague *v.* Duel, 1 Clarke (N. Y.), 90; Ripley *v.* Babcock, 13 Wis. 425; Litlaw *v.* Litlaw, 54 Penn. St. 216; Saxon *v.* Whittaker, 30 Ala. 237; Breed *v.* Pratt, 18 Pick. (Mass.) 115; Smith *v.* Tibbitt, L. R., 1 P. D. 398; Att'y-Gen'l *v.* Paruthers, 3 Br. C. C. 443; Hassord *v.* Smith, L. R., 6 Eq. 429; Grimani *v.* Draper, 6 Ec. & Mar. Cas. 421; Nicholas *v.* Burns, 1 Swab. & T 243; Johnson *v.* Blane, 6 Ec. & Mar. Cas. 457; but see People *v.* Smith, 57 Cal. 130, where it was held in a criminal trial that it was proper for the court to refuse to instruct the jury that if the defendant was shown to have been insane just before the crime was committed, the presumption was that he was insane when he committed it, but holding that such a refusal is erroneous when the insanity is shown to have been habitual. See State *v.* Wilner, 40 Wis. 304.

[3] Hix *v.* Whittemore, 4 Met. (Mass.) 545; Hall *v.* Warren, 9 Ves. 605; Walcott *v.* Alleyn, Milw. Ex. Tr. 69; Airey *v.* Hill, 2 Add. 289; White *v.* Wilson, 13 Ves. 87.

[4] Murphy *v.* Dorr, 25 Ill. 251.

[5] Pickett *v.* Peckham, L. R., 4 Ch. App. 190; Blandy *v.* De Burgh, 6 C. B. 623; Alderson *v.* Clay, 1 Stookée, 405; Clark *v.* Alexander, 8 Scott, 161; Ryan *v.* Lams, 12 Q. B. 460.

[6] Ryan *v.* Lams, *ante*.

[7] Scales *v.* Key, 11 Ad. & El. 819.

[8] Reg. *v.* Lilleshall, 7 Q. B. 158.

alleged by the plaintiff to have been executed by him in his minority, it was held that there was no presumption that he had attained his majority, and that he must prove that fact.[1] So, where a person is shown to have resided at a certain place at any time, it will be presumed that he continues to reside there until the contrary is shown.[2] So, where it is shown that a person's reputation for truth and veracity was good three years ago, it will be presumed that it still continues so.[3] So, where property is shown to have belonged to a person prior to his death, it will be presumed to have belonged to him at the time of his death;[4] and generally, where property, either real or personal, is shown once to have belonged to a person, it will be presumed that it continues to be his until the contrary is shown.[5] The opinions of individuals once entertained and expressed, and the state of their mind once proved to exist, are presumed to remain unchanged.[6] A person once shown to have been living will be presumed to be still alive, in the absence of evidence that they have not been heard from within the last seven years.[7] But where a person goes abroad, and nothing is heard from him by those who, if he was living, would be likely to hear from him, the presumption of his life ceases after seven years.[8] By the civil law the legal presumption of life ceases

[1] Irvine *v.* Irvine, 5 Minn. 61.

[2] Kilburn *v.* Bennett, 3 Met. (Mass.) 199; Prather *v.* Palmer, 4 Ark. 456; Wilmington *v.* Burlington, 4 Pick. (Mass.) 174; Randolph *v.* Easton, 22 id. 242; Rixford *v* Miller, 49 Vt. 319.

[3] Lum *v.* State, 11 Tex. App. 483.

[4] Hanson *v.* Chatovich, 13 Nev. 395.

[5] Harrison *v.* Queen Ins. Co., 49 Wis. 71.

[6] State *v.* Stinson, 7 Law Rep. (Am.) 383.

[7] R. *v.* Lumley, L. R., 1 C. C. 196; Letts *v.* Brooks, H. & D. Suppt. (N. Y.) 36.

[8] Whiteside's Appeal, 23 Penn. St. 114; Smith *v.* Knowlton, 11 N. H. 191; Crawford *v.* Elliott, 1 Houst. (Del.) 465; Primm *v.* Stewart, 7 Tex. 178; Coper *v.* Thurmond, 1 Ga. 538; Brown *v.* Jewett, 18 N. H. 230; Smith *v.* Smith, 5 N. Y. Eq. 484; Osborn *v.* Allen, 26 N. J. L. 388; Burr *v.* Sim, 4 Whart. (Penn.) 450; Bradley *v.* Bradley, 4 id. 173; Flynn *v.* Coppee, 12 Allen (Mass.), 133; Forsaith *v.* Clark, 21 N. H. 409; Stinchfield *v.* Emerson, 52 Me. 465; Norman *v.* Jenkins, 10 Pick. (Mass.) 515; Eagle *v.* Emmett, 4 Bradf. (N. Y. Surr.) 117; Loring *v.* Steinman, 1 Met. (Mass.) 404; Mansburgh *v.* Jackson, 2 N. J. L. 229; Spurr *v.* Trimble, 1 A. K. Mar. (Ky.) 278; Stevens *v.* McNamara, 36 Me. 176; Tilley *v.* Til-

in one hundred years from the date of birth,[1] and such also is the rule in the Scotch law ;[2] but in this country as well as in England there is no fixed time within which the presumption is allowed to prevail, and the fact that the person, if living, would be more than one hundred years old, is not conclusive.[3] In one case, where it was shown that the person, when last heard from, was twenty-two years old and in bad health, and would, if then living, be eighty years old, and although, upon inquiry at his last known place of residence and post-office address, his name was not known at the post-office nor inserted in the city directory, was held not sufficient to raise a presumption of his death.[4] In an English case the deposition of a witness taken sixty years before was rejected, there being no proof that a search had been made for the witness, and no account being given of him ;[5] and in another case, where the term was sixty years old, the court took into consideration the *possibility* of the termor still being alive.[6] But in an action of ejectment, where the lessor of the plaintiff, to prove his title, put in a settlement 130 years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were instructed that they might presume, not only that these persons were dead, but in the absence of all evidence to the contrary, that they died unmarried and without issue.[7] Whether the portion of the doctrine of the last case relating to the presumption that the persons died without issue there may be some doubt, but in any event it seems that such a presumption will be sustained by very slight proof, such as

ley, 2 Bland (Md.), 436 ; Whiting *v.* Nicholl, 46 Ill. 230 ; Asburgh *v.* Saunders, 8 Cal. 62 ; Clarke *v.* Canfield, 15 N. J L. 119. It is not necessary that the person should be shown to have gone out of the country ; it is sufficient if he is shown to have been absent, unheard of, from the particular State, seven years. Newman *v.* Jenkins, *ante ;* Woods *v.* Woods, 2 Bay (S. C.), 476 ; Spurr *v.* Trimble, *ante ;* Wambough *v.* Schenk, *ante.*

[1] Campegius Tract. de Test. reg. 350.

[2] Hubb Ev. of Succ. 758.

[3] Burney *v.* Ball, 24 Ga. 505 ; Weale *v.* Laever, Pollex, 67 ; Napper *v.* Sutton, Hutt. 119.

[4] Matter of Hall, 1 Wall., Jr. (U. S.) 85.

[5] Benson *v.* Olive, 2 Str. 920 ; Manby *v.* Curtis, 1 Price, 225.

[6] Beverley *v.* Beverley, 2 Vern. 131 ; Doe *v.* Andrews, 10 Q. B. 314.

[7] Doe *v.* Deakin, 3 C. & P. 402.

failure to hear of any such issue upon due inquiry, or failure to answer advertisements calling for heirs, etc.[1] While, however, the law raises a presumption of death after an absence of seven years, unheard of, yet it raises no presumption as to the *time* of death,[2] not even that he died on the *last day* of the seven years;[3] therefore if it became important for a party to establish the precise time of death, he must do so by evidence and cannot rely either upon the presumption of death upon the one hand or of the continuance of life upon the other.[4]

Sec. 63. Presumption of Death may be raised by Lapse of Period less than Seven Years, when.

While the presumption of the common law does not attach to the mere lapse of time less than seven years, independent of other circumstances, yet, upon an issue of life or death, the jury may, where the circumstances warrant it, find the fact of death from the lapse of a shorter period. Thus, where it appeared that a brig had sailed from Demerara to England, in December, 1828, and touched Dominica on the 24th of that month, and had never after been heard of, Vice-Chancellor Knight-Bruce, *after a lapse of seven years*, presumed that the vessel and crew were lost *before* the 29th of January, 1829, evi-

[1] Greaves *v.* Greenwood, L. R., 2 Exch. D. 287; see Emerson *v.* White, 29 N. H. 482, where it was held that there is no presumption either way as to marriage or the birth of children and that a person who asserts that a person is dead without issue must offer *some* evidence of the fact. But if the events are remote slight evidence will suffice.

[2] M'Carter *v.* Camel, 1 Barb. Ch. (N. Y.) 455. The probable time of death may be inferred from the circumstances, but if no sufficient facts are shown from which to draw a reasonable inference that death occurred *before* the lapse of that period, the person will, in all legal proceedings, be treated as having lived during the whole of that period. Eagle *v.* Emmett, 4 Bradf. (N. Y. Surr.) 117; Puckett *v.* State, 1 Sneed (Tenn.), 355; Gorden *v.* Gorden, 2 Houst. (Del.) 574; White *v.* Mann, 26 Me. 361; Merritt *v.* Thompson, 1 Hilt. (N. Y. C. P.) 550; Gibbs *v.* Vincent, 11 Rich. (S. C.) 323.

[3] Nepean *v.* Knight, 2 M. & W. 894; McCarter *v.* Camel, *ante*.

[4] *In re* Phene's Trusts, L. R., 5 Ch. App. 139; Dunn *v.* Snowden, 2 Dr. & Sm. 201; Lewe's Trusts, L. R., 11 Eq. 236; Lambe *v.* Orton, 29 L. J. Ch. 286; *In re* Benham's Trusts, 37 L. J. Ch. 265; Pennefeather *v.* Pennefeather, L. R., 6 Eq. 171; *In re* Peck, 29 L. J. Pr. & Mat. 95; Hickman *v.* Upsall, L. R., 20 Eq. 136.

dence being given that the average length of a voyage from Dominica to England was less than two months, and that the West Indian latitudes were subject to hurricanes, which were so much more prevalent between the 1st of August and the 10th of January that double rates of insurance were charged during that period.[1] So, too, when it is shown that a person when last heard of was aged, infirm or ill,[2] or has since been exposed to great perils, such as a storm and probable shipwreck,[3] death may be presumed in a less period. Thus, in the case of a missing ship bound from Manilla to London, on which the underwriters had voluntarily paid the amount insured, the death of those on board was presumed by the Prerogative Court, after the absence of only two years, and administration was granted accordingly.[4] So, also, where a person takes passage on a ship or steamer, and upon arrival at port he is not to be found upon the boat, the boat not having landed during the voyage, a jury might with great propriety from this fact presume the person's death during the voyage. So there are a variety of instances in which the peculiar circumstances would warrant a jury in finding the fact of death by the lapse of a less period than seven years. The burden of proving the death of a person is upon him who sets it up ;[5] and if he relies upon the absence of the person for seven years without being heard from, he must establish both facts before the presumption arises. Mere fact of absence is not enough ; he must show inquiries made at his last known residence abroad, or if he had none that is known to his friends, inquiries made of persons in the place where he was last known to reside before he went abroad, and inquiries among his relatives and friends who would be most likely to hear from him if living.[6] So the issuing of letters of administration upon the estate of a person is *primâ facie* evidence of the person's death, as it will be presumed that

[1] Sillick *v.* Booth, 1 Y. & C. 117; Ommaney *v.* Stillwell, 23 Beav. 328.

[2] R. *v.* Hasborne, 2 Ad. & El. 544; Beasney's Trusts, L. R., 7 Eq. 498.

[3] Watson *v.* King, 4 Camp. 272.

[4] Patterson *v.* Black, 2 Park's Ins. 919.

[5] Emerson *v.* White, 29 N. H. 482; Ashbury *v.* Sanders, 8 Cal. 62 ; Gilliland *v.* Martin, 3 McLean (U. S.), 490.

[6] McCartee *v.* Camel, 1 Barb. Ch. (N. Y.) 455 ; Clarke *v.* Cummings, 5 Barb. (N. Y.) 339.

the court issuing the letters did so upon competent proof of that fact.[1] Proof of absence without being heard from for a period *less* than seven years, though but a *day*, will not be sufficient. The full period must have elapsed, even though it is shown that the person was in feeble health when he left the neighborhood, or was very aged.[2] But, while the law raises the presumption of death after seven years' absence *abroad* (which means either beyond seas, or out of the State), without being heard from, yet it does not, except in peculiar cases, raise any presumption as to the *time* of death, but in all legal proceedings the person will be regarded as having lived until the expiration of the seven years;[3] *but* where a person sails on a voyage at a particular date, and the length of time which it takes to make the voyage is known, quickest and longest, it will, after the lapse of seven years without tidings from him, be presumed that he died within the period usually assigned for the longest voyage, and legal proceedings taken against or for him after that period will be deemed invalid.[4]

Sec. 64. Presumption as to Survivorship.

By the civil law, when two or more relatives have perished by the same calamity, as a wreck, battle, conflagration, etc., in the absence of direct proof as to which survived, certain artificial presumptions are resorted to which are based on the probabilities of survivorship resulting from strength, age and sex. Thus, in the case of a father and son perishing by the same shipwreck or battle, by the civil law it is presumed that the son died first *if he was under the age of puberty; but if he was above that age*, it is presumed that he was the survivor, upon the principle that in the former case the elder is generally the more robust, and in the latter the younger.[5]

[1] Tisdale *v.* Conn., &c., Ins. Co., 26 Iowa, 170; McNair *v.* Ryland, 1 Dev. (N. C.) 533.

[2] Ashbury *v.* Sanders, 8 Cal. 62; Burney *v.* Ball, 24 Ga. 505; Matter of Hall, Wall., Jr. (U. S.) 85.

[3] Eagle *v.* Emmett, 4 Bradf. Surr. Rep. (N. Y.) 117; White *v.* White, 26 Me. 361; Merritt *v.* Thompson, 1 Hilt. (N. Y. C. P.) 550; Puckett *v.* State, 1 Sneed (Tenn.), 355.

[4] Gerry *v.* Post, 13 How. Pr. (N. Y.) 118.

[5] Dig., lib. 34, tit. 5.

By the French code, regard is had to the ages of fifteen and sixty, presuming that, as between those *under* that age and not over sixty, the latter survives; but if one of the parties is under fifteen, and the other *over* sixty, the former survives. If both parties were between those ages, but of different sexes, it is presumed that the male survived, *unless he was more than a year younger* than the female; but as between those of the same sex, it is presumed that the youngest survives.[1] But by the common law there is no presumption either of survivorship or contemporaneous death, *but in the absence of all evidence upon the point, it will be treated as a matter incapable of being determined.*[2] The question is, from the beginning to the end, one of fact, as bearing upon which the sex, age and relative physical strength of the persons who were lost may be shown, and is generally the only evidence which can be had upon the question;[3] and as a rule, in the absence of any evidence upon which a finding can be based, it will be presumed that all perished at the same moment.[4] In other words, as the fact is incapable of proof, the courts will assume that all perished at the same second of time. In the language of CHURCH, C. J.,[5] "There are cases where a strong probability in theory at least would arise that one person survived another, and perhaps as strong as that there was a survivor, and yet the common law wisely refrains from acting upon it in either case. It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster, is not deemed sufficient. If there are other circumstances shown, tending to prove survivorship, courts will then look at the whole case

[1] Code Civil, §§ 720, 721, 722.

[2] Wing *v.* Augram, 8 H. L. Cas. 183; Smith *v.* Croom, 7 Fla. 81; Coye *v.* Lach, 8 Met. (Mass.) 371. But see Pell *v.* Ball, 1 Cheve (S. C.), part 2, 57, where the civil law rule was practically adopted.

[3] Underwood *v.* Wing, 4 D., M. & G. 24; Green's Settlement, L. R., 1 Eq. 289.

[4] SIR JOHN NICOLL in Taylor *v.* Diplock, 2 Phill. 261; In the matter of Selwyn, 3 Hogg Ec. Rep. 748.

[5] In Newell *v.* Nichols, 73 N. Y. 78. In this case a mother, aged sixty-nine, a son-in-law, aged forty-five, and two children, aged respectively ten and seven years, perished in the same shipwreck at sea, and in the absence of any other evidence it was held that there was no presumption of survivorship.

for the purpose of determining the question, but if only the fact of death by a common disaster appears, they will not undertake to solve it on account of the nature of the question and its inherent uncertainty. It is not impossible for two persons to die at the same time, and when exposed to the same peril under like circumstances, it is not, as a question of probability, very unlikely to happen. At most the difference can only be a few brief seconds. The scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of title to property depends upon it, and hence in the absence of other evidence the fact is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time. This is done not because the fact is proved, or that there is any presumption to that effect, but because there is no evidence, and no presumption to the contrary. The authorities are uniform upon this doctrine, but the expressions of some of the judges in announcing it are liable to be misunderstood as indicating a presumption of simultaneous death, which is not the rule. For instance, SIR WILLIAM WYNNE said: 'I always thought it the most natural presumption that all died together, and that none could transmit rights of property to another.'[1]

"SIR JOHN NICOLL said: 'I assume that both perished in the same moment.'[2] And in the absence of clear evidence it has generally been taken that both died in the same moment. SIR HERBERT JENNER said: 'The parties must be presumed to have died at the same time.'[3]

"These expressions only mean that as the fact is incapable of proof, the one upon whom the *onus* lies fails, and persons thus perishing must be deemed to have died at the same time, for the purpose of disposing of their property. The Lord Chancellor[4] recognized the distinction, and explained

[1] Rex *v.* Heapes, 2 Salk 593; 2 Phill. 296, note *c*; Doe *v.* Nepean, 5 B. & Ad. 91, 92.

[2] Taylor *v.* Diplock, 2 Phill. 261; In the Matter of Selwyn, 3 Hagg. Ec. R. 748.

[3] 1 Curties, 705.

[4] In Wing *v.* Underwood, *supra*.

the meaning of the rule. In commenting upon a similar expression of the Master of the Rolls to the effect that he must assume that Mr. and Mrs. Underwood both died together, the Chancellor said: 'From personal communication with his honor, I know that he is not aware that he ever used such an expression, and all he ever meant to say was that the property must be distributed just as it would have been if they had both died at the same moment.' And MR. BEST, in his work on Presumptions, after laying down the general rule, states that it is not correct to infer from this that the law presumes both to have perished at the same moment, and adds: 'The practical consequence is, however, nearly the same, because if it cannot be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary, both individuals may have died at the same moment.' All the common-law authorities are substantially the same way, and the rule, which I think is wise and safe, should be regarded as settled. Its propriety is not weakened by the circumstances that its first application in this court prevents this estate from being turned into channels never contemplated or intended by the testatrix."

Sec. 65. Presumptions as to Ships not heard from.

It is a rule in insurance law, that when a vessel has sailed upon a voyage, and no tidings of her have been received within a reasonable time, she shall be presumed to have foundered at sea.[1] But there must be some evidence that when she left the port of outfit she was bound upon the voyage insured.[2] This presumption is so strong that it cannot be rebutted by mere rumors,[3] nor is it necessary to call witnesses from the port of destination: it is sufficient if it is shown that she has not been heard of at the port of outfit, after she sailed;[4] nor, even though it appears that the crew were saved, is it necessary to call any of them, nor to show

[1] Green *v.* Brown, 2 Str. 1199; Newby *v.* Reed, 1 Park on Ins. 148; Koster *v.* Reed, 6 B. & C. 19; Brown *v.* Neilson, 1 Cai. (N. Y.) 525.

[2] Coster *v.* Innes, Ry. & M. 333.

[3] Koster *v.* Reed, *ante.*

[4] Twemlaer *v* Oswin, 2 Camp. 85.

that it was impossible to do so.[1] No definite time has been fixed upon, either by the common law or the custom of merchants, after which the insured may demand payment of his loss, when no intelligence of the vessel has been received. But the question in each case, whether a *reasonable* period for receiving tidings of the vessel has elapsed or not, is one of fact for the jury; although a practice has grown up among insurers in England, of deeming a vessel lost if she is not heard from within six months after her departure for any port in Europe, or in twelve months if bound for a greater distance.[2] If a ship, shortly after sailing, without visible or adequate cause becomes leaky or otherwise unfit for the voyage, it is presumed that she was unseaworthy when the risk commenced.[3] Thus, where a vessel, on the next day after sailing, suddenly sprung a leak and was lost, without any stress of weather or other visible cause to which the leak could be ascribed, it was held that the loss should be imputed to some latent or inherent defect in the vessel, which rendered her unseaworthy, and for which the underwriters were not liable.[4]

Sec. 66. Presumption as to Accounts.

It is presumed that an entry in a book of accounts, as originally made, was correct; consequently, if it is subsequently changed, the burden is upon the party presenting the account to show that the alteration expresses the real facts.[5] So, where it appears from the books of the parties, or from any other source, that the accounts between them have been settled, and a balance struck and agreed upon, it will be presumed that the balance so agreed upon is correct, and the burden of showing the contrary is upon the party who seeks to set aside the settlement.[6] Where the accounts

[1] Koster *v.* Reed, *ante.*

[2] 1 Park on Ins. 149.

[3] Parker *v.* Potts, 3 Dan. 23; Watson *v.* Clark, 1 id. 344; Munro *v.* Vandam, 1 Park on Ins. 469.

[4] Patrick *v.* Hallett, 3 John. Cas. (N. Y.) 76; Talcott *v.* Commercial Ins. Co., 2 John. (N. Y.) 124; Wright *v.* Orient Ins. Co., 6 Bos. (N. Y.) 269; Sturm *v.* Gt. Western Ins. Co., 40 How. Pr. (N. Y.) 423.

[5] Sheils *v.* West, 17 Cas. 324; S. P. State *v.* Knapp, 45 N. H. 148.

[6] Mills *v.* Johnston, 23 Tex. 308.

between the parties afford no evidence of a settlement having been made between them, they are presumed to be open, and the burden of proving the contrary is upon the party who claims that they were liquidated.[1] Where an account is given or forwarded to the other party and retained by him for a long time without objection, it is presumed to be correct,[2] and the burden is upon the party receiving it to prove its inaccuracy.[3]

Sec. 67. As to Agency.

Where a person makes a contract, oral or written, representing himself to be, and as the agent of another, it is, *as between him and the party with whom he contracted* in the first instance, presumed that he had authority to so act, and in an action against him thereon the burden is upon the plaintiff to show that he had no authority in fact to make such contract. Thus, where a promissory note is given to B., signed by A., agent for C., as the note upon its face does import a personal obligation, the burden is upon the plaintiff to show his personal liability,[4] but in an action against the supposed principal, there is no presumption either way, but the burden is upon the party seeking to enforce the contract, to establish in some way, by independent evidence, the fact of agency.[5] Where a person deals with a person who is agent for a foreign principal, the presumption is that he does not contract with the foreigner, but trusts the person with whom he actually makes the bargain;[6] but although JUDGE STORY, in his work on Agency,[7] says that this presumption is so strong as almost to amount to a presumption of law, yet it is held that the presumption may be rebutted by

[1] M'Lellan *v.* Crofton, 6 Me. 308.

[2] Chebb *v.* Chambers, 3 Ired. (N. C.) L. 374; Sheppard *v.* Bank of Missouri, 15 Mo. 143; Freeland *v.* Heron, 7 Cr. (U. S.) 147; Darby *v.* Lastrapes, 28 La An. 605; Rowell *v.* Pacific R. R. Co., 65 Mo. 658; Greene *v.* Harris, 11 R. I. 105.

[3] Bertrand *v.* Taylor, 32 Ark. 470; Vandeveer *v.* Statesir, 39 N. J. L. 593.

[4] Bradley *v.* McKee, 5 Cr. (U. S. C. C.) 298.

[5] Holmes *v.* Dodge, 1 Abb. Adm. (U. S.) 60; Reynolds *v* Continental Ins. Co., 36 Mich. 131.

[6] Heald *v.* Kenworthy, 10 Exch. 743; Story on Agency, § 290.

[7] § 290.

any evidence, extrinsic or intrinsic, which tends to show that credit was in fact given to the foreign principal.[1]

Sec. 68. As to Carriers; Negligence, &c.

In the case of common carriers, whether by land or water, upon proof of delivery of goods to them and loss of them by them it is presumed that they were lost by their negligence, and the burden is upon them to show that they were lost by one of the perils from which they are exempted either by the law or the contract of shipment,[2] and the same rule applies to bailees for hire. But this presumption only applies in the case of common carriers of goods, and in the case of carriers of passengers, except in special instances, some proof of negligence must be given ;[3] but as in the case of a railroad company, where an injury to a passenger results from the breaking down of a passenger coach, the breaking of a rail, the falling away of an embankment, the breaking down of a bridge, a collision of trains, or from the train being thrown from the track, the law will presume negligence on the part of the company unless the contrary is shown,[4] because in these instances the carrier owes a duty to the passenger to exercise reasonable vigilance to keep the appliances of the business in a safe condition, and from the very circumstance of the existence of the defect, it is reasonable, in the first instance, to presume that if he had done so, the injury would have been avoided. Indeed, in many cases, *from the mere happening of an accident* a jury will be warranted in presuming negligence, and this may be said to be the case *when the accident is one which, in the ordinary course of things, does not occur where proper care is exercised in the management of the business*, and consequently affords reason-

[1] Green *v.* Kopke, 18 C. B 549 ; Mahoney *v.* Kekule, 14 id. 390.

[2] Tarbox *v.* Eastern Steamboat Co., 50 Me. 339 ; Steamer Niagara *v.* Cordes, 21 How. (U. S.) 7 ; Shaw *v.* Gardner, 12 Gray (Mass.), 488 ; Ross *v.* Hill, 2 C. B 890 ; Coggs *v.* Barnard, 2 Ld. Ray'd, 978.

[3] Mitchell *v.* Western, &c., R. R Co., 30 Ga. 22 ; Northern Central Railway Co. *v.* State, 54 Md. 113 ; McKissock *v.* St. Louis, &c., R. R. Co., 73 Mo. 456.

[4] Pittsburgh, &c., R. R. Co. *v.* Williams, 74 Ind. 462 ; Flannery *v.* Waterford, &c., R. R. Co., I. & R., 11 C. L. 30 ; Skinner *v.* London, &c., Railway Co., 5 Exch. 787.

able grounds for presuming negligence.[1] Thus where a stage coach is overturned or breaks down without any apparent cause, the law implies negligence, and the burden is upon the owners to rebut the presumption.[2] So where a building is injured by a blast, the presumption is that the blast was not properly covered.[3] But in all cases it must be remembered that neither fault or negligence are to be presumed without *some* evidence upon which to predicate it.[4] In other words, the plaintiff must show an injury which *prima facie* resulted from some fault on the part of the defendant.[5]

Sec. 69. As to Character.

It is presumed that every man's character is good until the contrary is proved ;[6] consequently, in an action of slander or libel, it is not necessary for the plaintiff in the first instance to do more than prove the speaking or publishing of the words complained of, and if the defendant relies upon the truth of the words in defense, he must prove it. The fact that a man's character is shown to have been good, does not raise a presumption of innocence, as against evidence which reasonably raises a presumption of guilt.[7] But where there is a doubt, evidence of former good character is admissible to aid in its solution. Where the evidence is such as to raise a presumption against a man's character, and he does not attempt to remove it, it will be presumed that it cannot be done,[8] and such a presumption cannot be removed by show-

[1] Bryne *v.* Boadle, 2 H. & C. 722 ; Scott *v* London Dock Co., 3 id. 596 ; Kearney *v.* London, &c., Railway Co., L. R., 5 Q. B 411 ; 6 id. 759 ; Ware *v.* Gay, 11 Pick. (Mass.) 106.

[2] Ware *v.* Gay, *ante;* Feital *v.* Middlesex R. R. Co., 109 Mass. 398 ; Brehm *v.* Gt. Western R. R. Co., 34 Barb. (N. Y.) 256 ; Edgerton *v.* N. Y., &c., R. R. Co., 35 id. 389 ; Reed *v.* New York Central R. R. Co., 56 id. 493 ; Holyoke *v* G'd Trunk R. R. Co., 48 N. H. 541 ; Virginia Central R. R. Co. *v* Sanger, 15 Gratt. (Va.) 230; Pittsburgh, &c., R. R. Co. *v.* Thompson, 56 Ill. 138 ; Brignoli *v.* Gt. Eastern R. R. Co., 4 Daly (N. Y. C P.), 182.

[3] Ulrich v. McCabe, 1 Hilt. (N. Y. C. P.) 251.

[4] Lyndsay *v.* Conn. & Pass. River R. R. Co., 27 Vt. 643.

[5] Terry *v.* N. Y. Central R. R. Co., 22 Barb. (N. Y.) 574 ; Buel *v.* N. Y. Central R. R. Co., 31 N. Y. 314.

[6] Goggans *v.* Monroe, 31 Ga. 331.

[7] State *v.* Hagard, 12 Minn. 293.

[8] Parks *v.* Richardson, 4 B. Mon. (Ky.) 276.

ing that the party holds a certain public position, as, that he is licensed to practice as an attorney,[1] because experience has demonstrated that persons who have been elevated to high positions are liable to be lacking in integrity, and, if a man's character is really good, it is unreasonable to presume that he can always show it by direct proof.

Sec. 70. Fraud.

Fraud is never presumed, either at law or in equity,[2] but the burden is upon the party alleging to prove it,[3] *unless the circumstances shown are of such a strong and pregnant character that no other reasonable conclusion can be drawn from them*,[4] in which case the burden is shifted upon the other party to prove *bona fides* in the transaction;[5] and if the presumptive circumstances are strong, they will outweigh positive testimony against it.[6]

Sec. 71. Damages.

From proof of an injury to a right some damage is presumed to sustain the right,[7] but if more than nominal damages are claimed, they must be proved and cannot be presumed.[8] If a number of cattle belonging to different persons break into another's enclosure and do damage, each, in the absence of any proof to the contrary, will be presumed to have done an equal damage.[9]

[1] Haynes *v.* State, 17 Ga. 465.

[2] Reeves *v.* Dougherty, 7 Yerg. (Tenn.) 222; Hager *v.* Thomson, 1 Blackf. (U. S.) 80; Blaisdell *v.* Carnell, 14 Me. 370; Martin *v.* Drumm, 12 La. An. 494; Sutter *v.* Lackman, 39 Mo. 91; Wright *v.* Prescott, 2 Barb. (N. Y.) 196; Salmon *v.* Orser, 5 Duer (N. Y.), 511; Packard *v.* Clapp, 11 Gray (Mass.), 124; Oaks *v.* Harrison, 24 Iowa, 179; Hair *v.* Little, 28 Ala. 236; Silvers *v.* Hedges, 3 Dana (Ky.), 439.

[3] Hager *v.* Thomson, *ante*.

[4] Poxton *v.* Boyce, 1 Tex. 317; Short *v.* Staples, 1 Gall. (U. S. C. C.) 104; Gayso *v.* Delaraderi, 9 La. An. 278.

[5] Hair *v.* Little, *ante*.

[6] Short *v.* Staples, *ante*.

[7] Tedder *v.* Stiles, 16 Ga. 2.

[8] Fasseler *v.* Lane, 48 Penn. St. 407; Farley *v.* Vanmickle, 19 La. An. 9.

[9] Partenheimer *v.* Van Orden, 20 Barb. (N. Y.) 479.

Sec. 72. Identity.

Identity of name is *prima facie* evidence of identity of person,[1] where there are no particular circumstances tending to raise a question as to the party being the same.[2] Thus, it has been held that two certificates for vacant land granted in the same name will be presumed to have been granted to the same person.[3] But, if required, some evidence beyond that of mere identity of name must be given that the plaintiff is the same person who is entitled to an interest in real estate.[4] But this presumption of identity of person from identity of name may be overcome by proof that there is more than one person by that name or that the name is a common one.[5] Of course the strength of this presumption is increased when there is not only identity of name, but also of profession and place of abode or of age.[6] Mere *similarity* of name is no proof of identity of person. Thus the question whether R. P. O'Neil, who executed the deed, and Rev. P. O'Neil, who owned the land, were the same person, was held to have been erroneously submitted to the jury without some proof of identity beyond that named.[7]

Sec. 73. Abandonment.

An abandonment of a right is never presumed,[8] but must be proved as a fact,[9] except where the right has been per-

[1] Gitt *v.* Watson, 18 Mo. 274; Cates *v.* Loftus, 3 A. K. Mar. (Ky.) 202. But see Mooers *v.* Bunker, 29 N. H. 420; Reynolds *v.* Staines, 2 C. & K. 745; Murietta *v.* Wolfhagen, 2 id. 744.

[2] Roden *v.* Ryde, 4 Q. B. 626; Hamber *v.* Roberts, 7 C. B. 861; Barker *v.* Stead, 3 C. B. 946; Whitelocke *v.* Musgrove, 1 C. & M. 511; Jones *v.* Jones, 9 M. & W. 75.

[3] Cates *v.* Loftus, *ante*.

[4] Moers *v.* Bunker, 29 N. H. 420.

[5] Jones *v.* Jones, *ante*. In McMinn *v.* Whelan, 27 Cal. 300, it was held that where a certificate of sale by a tax collector is to Michael Dundon and the deed is to Patrick Michael Dundon, Jr., it will not be presumed that the same person is meant in both instruments, especially when it is proved that there are two persons by the name of Dundon, one of whom is Michael and the other Patrick Michael.

[6] Smith *v.* Henderson, 9 M. & W. 798; Russell *v.* Smyth, 9 id. 818; Simpson *v.* Dinsmore, 9 id. 47.

[7] Burford *v.* McCue, 53 Penn. St. 427.

[8] Oneamuno *v.* The Much Sam, &c., Co., 1 Nev. 215; State *v.* Atkinson, 24 Vt. 448; White *v.* Halliday, 11 Tex. 606.

[9] Green *v.* Forbene, 2 La. An. 957.

mitted to lie dormant, without assertion, for more than twenty years.[1]

Sec. 74. Presumption of a Grant.

After peaceable and uninterrupted adverse possession of land for the period provided by statute for acquiring the title to land by adverse possession, a grant will generally be presumed.[2] But in such cases mere length of possession, however great, unless the possession is for a period as long as that required by the statute to constitute a bar, will not be sufficient. *But where there has been a long and peaceable possession of land consistent with the grant to be presumed, and there are other circumstances which make it reasonable to believe that such grant was actually made*, but through great lapse of time or other circumstances the evidence of such grant is probably lost or destroyed, then the length of possession *and the auxiliary circumstances* should be allowed to go to the jury, and they should be permitted to pass upon the question whether a grant has been made or not.[3] But such presumption may be repelled by parol proof where the presumption is raised by parol evidence,[4] or by the production or proof of the contents of an instrument under which the possession was held, which repels the presumption of a grant.[5] In order to raise the presumption of a grant from long possession, it is not necessary that the possession should have always been in the presumptive grantee.[6] In order to warrant a jury in presuming a grant, it is not necessary that they should find that a deed or grant has been actually executed, but without really believing that a grant has been made, they may presume its existence for the purpose of quieting title.[7] Such presumptions, however, of conveyances of corporeal

[1] Geiger *v.* Miller, 24 Penn. St. 109.

[2] Rooker *v.* Perkins, 14 Wis. 79; Brandt *v.* Ogden, 1 John. (N. Y.) 156.

[3] Townsend *v.* Downer, 32 Vt. 183.

[4] English *v.* Register, 7 Ga. 387.

[5] Nieto *v.* Carpenter, 21 Cal. 455. See also Farrar *v.* Merrill, 1 Me. 17; Hurst *v.* McNeil, 1 Wash. (U. S.) 70; Jefferson Co. *v.* Ferguson, 13 Ill. 33.

[6] Glass *v.* Gilbert, 58 Penn. St. 266.

[7] Eldridge *v.* Knott, 1 Cow. 214; Deeble *v.* Linehan, 12 Ir. L. R., N. S. 1; Williams *v.* Donell, 2 Head. (Tenn.) 695.

hereditaments are seldom made, except when a title has been shown by the party who calls for the presumption, *which is good in substance*, but is lacking in some collateral matter necessary to make it complete in form,[1] or where the law has vested the title in him by adverse possession. While the presumption of a grant from the State will not be made from a simple occupancy sufficient to acquire a title by adverse enjoyment, as against an individual, yet it seems now to be well settled that, *where the adverse claim could have had a legal commencement*, a legal commencement may be presumed after long-continued peaceable enjoyment, accompanied by the usual acts of ownership.[2] Grants of charters and acts of the legislature even have thus been presumed and found by juries.[3] And upon the same principle the long enjoyment of duties, tolls, etc., if the nature of the case admits of it, has been held to warrant the presumption of any facts necessary to give them validity.[4] And it has even been held that a series of acts of ownership exercised by an adjoining owner upon the seashore for a long period of time afford sufficient evidence for a jury to presume a grant from the sovereign to one of his ancestors.[5] A right by grant to case-

[1] Doe *v.* Cooke, 6 Bing. 179.

[2] Mayor of Hull *v.* Horner, 1 Cowp. 102; R. *v.* Brown, cited 1 id. 110; Mather *v.* Trinity Church, 3 S. & R. (Penn.) 509. In McCarty *v.* McCarty, 2 Strobh. (S. C.) 6, it was held that, though an act of the legislature after twenty years' possession and use may be presumed yet that the principle is exclusively confined to cases in which the legislature *might act, and cannot apply where, from the constitution or a sort of common law of the State, the legislature never has acted and never will act.*

[3] Mayor of Hull *v.* Horner, *ante;* McCarty *v.* McCarty, *ante;* Palmer *v.* Hicks, 6 John. (N. Y.) 33; Grimes *v.* Bastrop, 26 Tex. 310; Taylor *v.* Watkins, 26 id. 688; Walker *v.* Hanks, 27 id. 535; Lopez *v.* Andrews, 3 M. & R. 329 *a;* Att'y-Gen. *v.* Emeline Hospital, 17 Beav. 366; Devine *v.* Wilson, 10 Mo. P. C. 527.

[4] Mayor of Exeter *v.* Warren, 1 Q. B. 801; Gaun *v.* Free Fishers of Whitstoph, 20 C. B., N. S. 1; Mills *v.* Mayor of Colchester, L. R., 2 C. P. 476; Bryant *v.* Foot, L. R., 2 Q. B. 161; Lawrence *v.* Hitch, 3 id. 352.

[5] Beaufort *v.* Mayor of Swansea, 3 Exch. 413; Malcomson *v.* O'Dea, 10 H. L. Cas. 593; Shephard *v.* Payne, 3 N. R. 580; Pelham *v.* Pickersgill, 1 T. R. 66. In Archer *v.* Sadler, 2 H. & M. (Va.) 370, a quiet possession of sixty years; in Hunks *v.* Tucker, Tayl. (N. C.) 157, of forty years, and in Allston *v.* Saunders, 1 Bay (S. C.), 26, forty-seven years was held sufficient to raise a presumption of such a grant.

ments and incorporeal hereditaments may be presumed from an adverse user for the period fixed by statute for the acquisition of a title to land by adverse user.[1] Thus, by such adverse user the right to a private way is acquired, the presumption being from such adverse and undisturbed user that the right passed to the person using it by a regular grant,[2] and the same rule applies to all species of easements and incorporeal rights to which the Statute of Limitations does not apply. But such a presumption does not necessarily arise from mere length of possession in reference to corporeal subjects, as lands and tenements, because in reference to them the Statute of Limitations has made all the provisions which the law deems necessary for quieting the title. But, as has already been stated, length of possession *may, in connection with other circumstances*, be proved to perfect the evidence of title to lands, *and the longer the possession, the stronger is the presumption*.[3] But a possession of lands for a *less* time than that fixed by the statute for quieting the title will not raise a presumption of a grant, because it would amount to an evasion of the statute.[4] But when an *actual* transfer of title is to be made out, of which the deed or other documentary evidence has been lost, is relied upon, and is to be made out either in whole or in part by secondary evidence, length of possession, like any other circumstantial fact, is admissible as *corroborative* evidence of such transfer, and is no more material to the main fact than any other supposable circumstance; and possession for a *shorter* time than that prescribed in the Statute of Limitations is admissible, although, as previously stated, the longer the possession, the stronger is the presumption arising from that fact.[5] "But," says GOULD, J., in the case last cited, "where length of time is relied upon *as a presumptive bar*, that is, where mere length of possession is the only fact required to be proved, and is *of itself*

[1] Hill *v.* Crosby, 2 Pick. (Mass.) 466; Livett *v.* Wilson, 3 Bing. 115.

[2] Com. *v.* Low, 3 Pick. (Mass.) 408; Wright *v.* Freeman, 5 H. & J. (Md.) 497.

[3] GOULD, J., in Sumner *v.* Child, 2 Conn. 629.

[4] Terrill *v.* Herron, 4 J. J. Mar. (Ky.) 516.

[5] GOULD, J., in Sumner *v.* Child, 2 Conn. 629.

the conclusive fact from which a title is to be peremptorily presumed, upon the principle of quieting possession, and whether an original title is actually believed to have existed or not, the subject in controversy always is, and must be, an incorporeal right."[1]

Sec. 75. Of Conveyance.

From a long-continued possession a conveyance to the occupant of land may be presumed,[2] and that all acts necessary to give it effect were done.[3] Especially is this the case where the occupant exercised all the acts of ownership, paid the taxes, etc.[4] Where there has been long possession of land under a deed by one who executes it as executor, a will will be presumed to have existed in order to confirm the title of the grantee;[5] and where a sale under a statute had been made by a trustee, and the grantee had been in possession for fifty years, it was held that the jury might presume that the trustee conveyed with license.[6] So, where there had been a similar possession under a deed executed by an agent, it was presumed that the agent was authorized to execute the deed.[7] So, where a deed was executed of lands sold for taxes, it was presumed that the requisite formalities were observed to give validity to the sale.[8] But this is not the case unless there has been long possession under the deed, and, where twenty-three years after the execution of a collector's deed, the grantee took possession for *five* years, it was held that no presumption as to the validity of the deed could be raised therefrom.[9] This presumption is made between private in-

[1] Gray *v.* Gardner, 3 Mass. 399; Bunce *v.* Walcott, 2 Conn. 27; McDonald *v.* McCall, 10 John. (N. Y.) 377.

[2] McNair *v.* Hunt, 5 Mo. 300. In this case 30 years. Newman *v.* Studley, 5 id. 291. In this case 26 years. Thompson *v.* Carr, 5 N. H. 510. A separate possession of lands held in common, raises a presumption that a partition deed was executed. Hepburn *v.* Auld, 5 Cr. (U. S.) 262.

[3] Brattle Square Church *v.* Bullard, 2 Met. (Mass.) 263; Valentine *v.* Piper, 22 Pick. (Mass.) 85.

[4] Cheney *v.* Watkins, 1 H. & J. (Md.) 527.

[5] Maverick *v.* Austin, 1 Bailey (S. C.), 59.

[6] Thompson *v.* Carr, 5 N. H. 510.

[7] Jarboe *v.* McAtee, 7 B. Mon. (Ky.) 279.

[8] Cuttle *v.* Brockway, 24 Penn. St. 145.

[9] Richardson *v.* Dorr, 5 Vt. 9.

dividuals, in favor of a party who has proved a right to the beneficial ownership of property, and *whose possession has been consistent with the existence of such a conveyance as is to be presumed, especially where his possession would have been unlawful except for such a conveyance.*[1] But where the original possession of the land may be accounted for without there having been a conveyance, it is proper for the jury to presume a conveyance or not, according to their belief;[2] and it seems that a conveyance may be presumed, even though by law deeds are required to be recorded, and the records afford no evidence of such a deed.[3]

[1] Hammond *v.* Cooke, 6 Bing. 180.

[2] Fenwick *v.* Reed, 5 B. & A. 233.

[3] In Beauland *v.* Hurst, 1 Price, 475, there was an act for registering deeds and conveyances in the West Riding of Yorkshire, on which act the question arose, declares that they shall be recorded, in order to protect the grantee against subsequent *bona fide* sales and mortgages. It is nearly the same as our general registry acts in the United States. In that case, a grant of coal in the West Riding of Yorkshire was sought to be presumed from circumstances. This was resisted on the ground that the registry alone should speak; and there was no registry. The omission was relied on as effectually repelling all presumption in the case. The point does not appear to have been decided. But the question at the trial was left to the jury by BAILEY, J., and on the argument at bar, Rex *v.* Long Buckby (7 East, 45) was cited, and appears to be conclusive, that such a case presents as fair a subject of presumption as any other. In the latter case an indenture of apprenticeship had been lost, and was to be proved by parol; but there was no evidence that it had ever been stamped, and no registry of that fact at the stamp-office, where it must have appeared, if there had been no irregularity. But after nearly twenty years, during which the indentures had been acted upon as valid, the court held that the evidence of non-registry was not sufficient *per se* to repel the presumption, but they would rather suppose that the paper had been stamped, and that the proper office had omitted the registry by mistake. This was a case where, without a stamp, the indentures would have been a nullity to all intents, and where, in the regular course of things, there must have been a registry. It was surely much stronger against the presumption than the omission to register a deed of conveyance. The latter was valid as against the party without registry; and the grantee being in possession, they would be valid against all the world, purchasers and mortgagees included. Gouverneur *v.* Lynch, 2 Paige Ch. (N. Y.) 300, 301, and the cases there cited. Neither are the registering acts imperative, nor is there, in case of a deed, any great danger in omitting to register. It is entirely optional with the party, and if purchasers or mortgagees are uninjured by lack of constructive notice, none others can complain. Where notice alone is the object, it is given by a

The presumption of a conveyance, as well that all necessary formalities were observed in making it, may be rebutted by proof tending to a contrary conclusion,[1] and, while ancient deeds under which the grantee has entered into possession are to be upheld, although defective in form or execution,[2] yet a *title* cannot be presumed to have been perfected where deeds showing a *defective* title are produced[3] when the origin of the possession is accounted for without the aid of a grant, or conveyance, and it is consistent with the fact of there having been no conveyance, stronger evidence than mere possession is required to warrant a jury in finding that a conveyance has been made,[4] and this rule prevails where a right is claimed from *mere user*, without any trace of the commencement of it, the title being referable to prescription rather than a grant.[5]

A presumption of a grant, or conveyance, can only arise where there has been an exclusive occupancy as owner ; and where the occupancy is casual and general and does not exclude the real owner, it cannot be raised,[6] nor can it be

change of possession to the grantee ; and an absolute deed may ordinarily be withheld from the record, without any danger. Indeed, this is often so in practice. And it follows that there is nothing in the omission to register necessarily inconsistent with the common presumption which involves the previous existence and loss, and may equally well include the non-registry.

The law presumes a conveyance where there has been long-continued possession of land under a claim of title, and the parties are shown to have acted as though a deed had been given. Wendell *v.* Moulton, 25 N. H. 41. Over twenty years' possession is held in South Carolina to raise the presumption of a grant. Thompson *v.* Peake, 7 Rich. (S. C.) 353 ; Kimbrall *v.* Walker, 7 id. 422. The presumption of law is founded upon a fair presumption of fact, and is frequently resorted to to supply the place of lost deeds. Demeyn *v.* Legg, 18 Barb. (N. Y.) 14; Simpson *v.* Hyatt, 1 Jones L. (N. C.) 518 ; Spears *v.* Oakes, 4 Rich. (S. C.) 347. Adverse possession of the land must be shown before any presumption will be made in favor of the claimant. Wadsworthville School *v.* Meetze, 4 id. 50. Permissive possession will raise no such presumption. Roxbury *v.* Huston, 37 Me. 42.

[1] Chiles *v.* Conley, 2 Dana (Ky.), 21 ; Ladd *v.* Campbell, 32 Penn. St. 250.

[2] Hill *v.* Lord, 48 Me. 83.

[3] Owings *v.* Norwood, 2 H. & J. (Md.) 96.

[4] Fenwick *v.* Reed, 5 B. & Ad. 232 ; Blewitt *v.* Tregonning, 3 id. 544.

[5] Blewitt *v.* Tregonning, *ante*.

[6] Bethum *v.* Turner, 1 Me. 111.

raised where there are circumstances which rebut it, as where the land occupied belongs to the State, or where the right exercised is one which the State only can grant,[1] nor where the right exercised is a common or natural right,[2] nor where it appears that the party might, if he chose to do so, produce the deed.[3]

Sec. 76. Official Acts.

Every officer acting under the sanction of an oath, or in whom the government reposes a trust, is presumed to have done his duty until the contrary is proved,[4] and this principle applies not only to proceedings against an officer, but also to an action against the right of an individual derived through the act of such officer ;[5] and a person who alleges a breach of official duty must show every fact necessary to establish such breach.[6] This rule is in accordance with and is embodied in the maxim, *Omnia praesumuntur rite esse acta*, and is regarded as one of the most important presumptions of the law.[7] In obedience to this presumption, the burden is always upon the party alleging it, to show a neglect of official duty[8] or irregularity in its performance.[9] Thus, if a clerk of court has no authority to administer an oath out of court, jurats attached to papers signed by him as clerk will

[1] Rhodes *v.* Whitehead, 27 Tex. 304; Ashley *v.* Eastern R. R. Co., 5 Met. (Mass.) 368.

[2] Frazier *v.* Brown, 12 Ohio St. 294.

[3] Browne *v.* Thompson, 4 Q. B. 543.

[4] Sennett *v.* State, 17 Tex. 308; Hartwell *v.* Root, 19 John. (N. Y.) 345; Kelley *v.* Creer, 53 Penn. St. 302; McMahon *v.* Davison, 12 Minn. 357; Guy *v.* Washburn, 23 Cal. 111; Dawkins *v.* Smith, 1 Hill (S. C.) Eq. 369; Mercer *v.* Doe, 6 Ind. 80; Ellis *v.* Carr, 1 Bush (Ky.), 527; Jenkins *v.* Parkhill, 25 Ind. 473; Schermerhorn *v.* Talman, 14 N. Y. 43; Kimball *v.* Lamprey, 19 N. H. 409; Walley *v.* Calloway Co. Court, 1 Mo. 447; Tademeir *v.* Aspinwall, 43 Ill. 401; Hancock *v.* Eastern River Lack., &c., Co., 20 Me. 72; Leas *v.* Polk Copper Co., 21 How. (U. S.) 493.

[5] Hickman *v.* Boffman, 1 Hard. (Ky.) 348.

[6] Craig *v.* Adair, 22 Ga. 373.

[7] Taylor on Ev. (7th ed.) 156.

[8] Dobbs *v.* Justices, &c., 17 Ga. 624.

[9] Palmer *v.* Boling, 8 Cal. 384; State *v.* Howard, 10 Iowa, 101; Russell *v.* Beebe, Hempst. (U. S. C. C.) 704; Ross *v.* Read, 1 Wheat. (U. S.) 482; Minter *v.* Cromelin, 18 How. (U. S.) 87; United States *v.* Arredondo, 6 Pet. (U. S.) 691.

be presumed to have been verified in court.[1] So where an officer is required by law to give notice of certain facts, it will be presumed that he gave such notice;[2] or where the law requires that certain facts should be established before he does certain acts, or permits them to be done, that the proper evidence was furnished him ;[3] or when he does a certain act which would be a violation of duty unless certain terms or conditions had been performed, it will be presumed that such conditions were performed.[4] Where an officer is required by law to do certain acts before he enters upon the discharge of his duties, as to be sworn,[5] to give bonds, etc.,[6] after he has entered upon the discharge of such duties, it will be presumed not only that he was duly appointed, but also that he had complied with all the statutory requirements,[7] although there is nothing in the records[8] or in the returns made by him to show the fact.[9] But this presumption will not be permitted to sustain a vital jurisdictional fact,[10] nor to sustain acts done by him outside of or contrary to the usual and well recognized functions and duties of his office.[11] But where the act is within the functions of his office, it will be presumed that all preliminary steps requisite to give validity to his acts had been taken,[12] unless upon the face of a return or report made by him, or of a record of his proceedings, there is something which repels such a presumption.[13]

[1] Schermerhorn *v.* Talman, 14 N. Y. 93.

[2] People *v.* Phenix Bank, 4 Bos. (N. Y.) 363.

[3] Forsaith *v.* Clark, 21 N. H. 409; Hart *v.* Young, 3 J. J. Mar. (Ky.) 408 ; Webber *v.* Gottschalk, 15 La. An. 376.

[4] Titus *v.* Kimbro, 8 Tex. 210 ; Lackawanna Iron Co. *v.* Fales, 55 Penn. St. 90 ; Kilpatrick *v.* Frost, 2 Grant's Cas. (Penn.) 168. In Shorey *v.* Hussey, 32 Me. 579, it was held that, where the law required an officer serving a writ of replevin to take a replevin bond, it will be presumed that he took such bond, although his return upon the writ does not show the fact.

[5] Nelson *v.* People, 23 N. Y. 293.

[6] Hutchings *v.* Van Bokkelin, 34 Me. 126.

[7] Jones *v.* Minisbach, 26 Tex. 235 ; McCutchen *v.* Pratt, 22 Wis. 561.

[8] State *v.* Halstead, 18 N. H. 59.

[9] Shorey *v.* Hussey, *ante ;* Alleghany *v.* Nelson, 25 Penn. St. 332.

[10] Sheldon *v.* Wright, 7 Barb. (N. Y.) 39.

[11] Jones *v.* Minisbach, 26 Tex. 235 ; Houston *v.* Perry, 3 Tex. 390.

[12] New Orleans *v.* Halpin, 17 La. An. 185 ; Palmer *v.* Boling, 8 Cal. 384 ; State *v.* Howard, 10 Iowa, 101 ; Plank Road Co. *v.* Bruce, 6 Md. 457.

[13] Moreau *v.* Branham, 27 Mo. 351 ; Ward *v.* Barrows, 2 Ohio St. 241.

The general rule universally applied in all civilized countries, is that acts which purport to have been done by public officers in their official capacity, and within the scope of their duty, will be presumed to have been regular and in accordance with their authority, until the contrary appears.[1] Thus it will be presumed in the first instance that municipal authorities have complied with all the formalities of the law in making contracts;[2] that officers have complied with the law in the drawing of jurors;[3] that an assessment was made at the proper time;[4] that all entries, including those upon the margin, and cancellations or interlineations not amounting to a mutilation, in public records, were regularly and honestly made.[5] So, where the statute requires that a seal must be attached to a sheriff's deed to make it valid, a court is precluded from presuming that it was once sealed, by an answer alleging that the sheriff omitted the seal by mistake.[6] So, while a general return by an officer, "executed," will raise a presumption that the process was rightly executed, yet, if the *manner* of its execution is set forth, its accuracy may be inquired into by the court.[7] But in all cases where the return of an officer is attacked, the burden of establishing the falsity of any of the matters recited therein is upon the party attacking it.[8]

Where a return of a survey of lands is made by an officer appointed for that purpose, having every appearance of regularity, it will be presumed to be regular until the contrary is proved,[9] and cannot be questioned by a mere trespasser;[10]

[1] Ross *v.* Reed, 1 Wheat. (U. S.) 482; Dunlop *v.* Munroe, 1 Cr. (U. S. C. C.) 536; United States *v.* Arredondo, 6 Pet. (U. S.) 691; Nimter *v.* Crommelin, 18 How. (U. S.) 87.

[2] New Orleans *v.* Halpin, 17 La. An. 185.

[3] State *v.* Howard, 10 Iowa, 101.

[4] Palmer *v.* Boling, 8 Cal. 484.

[5] Rice *v.* Cunningham, 29 Cal. 492.

[6] Moreau *v.* Branham, *ante*.

[7] Case *v.* Calston, 1 Met. (Ky.) 145. In Drake *v.* Mooney, 31 Vt. 617, where an officer stated in his return upon an execution, that he advertised the property as the law directs, and then proceeded to state the places in which it was advertised, the law requiring it to be advertised and sold in a public place, it was held that the court would presume that the places named were public places.

[8] Morse *v.* McCall, 13 La. An. 315. And the same rule prevails where a party claims that an officer has not discharged his duty. State *v.* Metton, 8 Mo. 417.

[9] Harris *v.* Burham, 1 Wash. (U.S.) 191; Jewell *v.* Porche, 2 La. An. 148.

[10] Trotter *v.* President, &c., 9 Mo. 69.

and if, in making a survey, they remove monuments established under a former survey, it will be presumed that the former survey was wrong and that the latter one is right.[1] Such surveyor's knowledge of the art of surveying need not be shown, as, from the circumstance of his appointment, it will be presumed.[2]

Sec. 77. As to jurisdiction of courts.

This presumption as to the regularity of official acts, so far as the action of courts of record is concerned, especially as to their jurisdiction, where there is nothing on the face of the record to defeat it, is conclusive.[3] But in a great majority of instances it may be controverted, and only operates as *prima facie* proof. In accordance with this rule, a court which has taken jurisdiction of a case is presumed to have had before it proper evidence of the facts necessary to give jurisdiction, and evidence of the contrary will not, after the lapse of time, be admitted.[4] But in the case of courts of limited jurisdiction, where the transaction is recent, the facts necessary to give it jurisdiction should appear.[5]

But when the jurisdiction of an inferior tribunal is established, the maxim, *Omnia praesumuntur rite esse acta*, applies to all its proceedings, as well as to courts of general jurisdiction,[6] and it will be presumed that it acted rightly.[7] Thus,

[1] Wilder *v.* St. Paul, 12 Minn. 192.

[2] Ashe *v.* Lanhan, 5 Ind. 435.

[3] Peacock *v.* Bell, 1 Wm. Saund. 74; Butcher *v.* Bank of Brownsville, 2 Kan. 70. When an entry of judgment is so made that its terms are applicable to a case in which the court had no jurisdiction, as well as to one within its jurisdiction, it will be presumed that it acted within its jurisdiction. Bumpus *v.* Fisher, 21 Tex. 561.

[4] Sprague *v.* Litherberry, 4 McLean (U. S.), 442; Grimstead *v.* Foote, 26 Miss. 476.

[5] Goulding *v.* Clark, 34 N. H. 148. A board of aldermen, sitting as a court to try charges against a city officer, is a court of limited jurisdiction, and everything necessary to make it such a court must be affirmatively shown, and no presumption can be made in its favor. Lampert *v.* Lithgow, 1 Bush (Ky.), 176. That this presumption does not apply in the case of courts exercising a special or merely statutory jurisdiction, see Graham *v.* Whitley, 26 N. J. L. 254; Swain *v.* Chase, 12 Cal. 283.

[6] State *v.* Hinchman, 27 Penn. St. 479.

[7] Outlaw *v.* Davis, 27 Ill. 467; McGreers *v.* McGreers, 1 S. & P. (Ala.) 30; Merritt *v.* Baldwin, 6 Wis. 439; Thorp *v.* Com., 3 Met.

where the evidence failed to show, affirmatively, that an administrator's bond was approved, in writing, by the judge of probate, and the contrary did not appear,—the case disclosing that all the other necessary steps were taken with strictness and accuracy; that the sale was public; that the purchaser entered immediately and held the premises for more than 20 years; that the law required such approval before the bond could be filed, and that the bond was actually filed,—the law fully authorized the conclusion that all was done which was required to give the purchaser a perfect title.[1] So, where a license has been granted, it is presumed that the court had the proper evidence before it.[2] So, where a letter of guardianship, regular on its face, is issued by a court having jurisdiction in the premises, it will be presumed that all the necessary preliminary requirements have been complied with, and that it was legally issued.[3] So, where a bond has been given, which the law requires should be approved by the court, such approval will be presumed, even though there is no written memorandum thereof on the bond.[4] It is presumed that a court of record of another State had jurisdiction of the subject-matter in controversy;[5] but such a presumption will not be made where there is evidence to the contrary, nor where the record fails to show notice to the defendant.[6]

Sec. 78. Regularity of Appointment of Officers.

If a person acts as a public officer, as a magistrate, judge, etc., proof of such fact is *prima facie* evidence that he was duly elected or appointed to such office,[7] and that he had the requisite authority as such to do the acts in question,[8] and

(Ky.) 411; State *v.* Farrish, 23 Miss. 483. This presumption applies to proceedings in a probate court. Richmond *v.* Hudenson, 18 Ark. 449.

[1] Austin *v.* Austin, 50 Me. 74.

[2] Com. *v.* Bolkom, 3 Pick. (Mass.) 281.

[3] Den *v.* Gaston, 25 N. J. L. 615; S. P. State *v.* Lewis, 22 id. 564; Cromelieu *v.* Brink, 29 Penn. St. 522; Morgan *v.* State, 12 Ind. 448.

[4] Cromelieu *v.* Brink, *ante.*

[5] Buffum *v.* Stimpson, 5 Allen (Mass.), 591.

[6] Com. *v.* Blood, 97 Mass. 438.

[7] Rex *v.* Verelst, 3 Camp. 432.

[8] Uray *v.* Hoyapanubby, 18 Miss.

has complied with all the requirements of the statute as conditions precedent to entering upon the discharge of their duties.[1] Consequently it is sufficient *prima facie* evidence to show that a person acted as a public officer without proof either of his appointment or election, and the burden is upon the person questioning his right to act as such, to prove that he had no authority to act as such, and this applies to attorneys,[2] justices of the peace, constables, ministers of the gospel,[3] officers of any branch of the revenue, or indeed any *public* officers. Thus proof that a person acted as sheriff,[4] deputy sheriff,[5] commissioner for the taking of depositions,[6] master in chancery,[7] or indeed in *any* public office, is, in general, sufficient proof of his authority to do so, until the contrary is proved; and this rule obtains as well in actions *in favor* of a public officer as in those *against* him.[8] In an early New York case[9] the defendant justified the taking of

452; Shelbyville *v.* Shelbyville, 1 Met. (Ky.) 52; Devall *v.* Chappin, 15 La. An. 566; Landry *v.* Martin, 15 id. 1.

[1] Nelson *v.* People, 23 N. Y. 293; Kilpatrick *v.* Froot, 2 Grant's Cas. (Penn.) 168; Lackawanna Iron Co. *v.* Fales, 55 Penn. St. 90. The rule is, in reference to acts of officers, where certain conditions precedent are asserted, that, when an officer does an act which would be a violation of duty unless certain terms or conditions had first been performed, such performance will be presumed, as between the individual and the State, to have taken place. Titus *v.* Kimbro, 8 Tex. 210. And the same rule prevails as to conditions precedent to be performed by an officer before he enters upon the discharge of his duties, and it will be presumed that he was duly appointed or elected and qualified in cases in which he is a party to the record, if it is shown that he has previously acted in the discharge of the duties of such office; and this presumption remains until it is removed by evidence. Hutchings *v.* Von Bokkelen, 34 Me. 126. And it would be obviously impolitic and inconvenient to throw upon parties the burden of showing, in the first instance, that public officers, upon whose acts they rely, were duly authorized or qualified to perform the act.

[2] Berryman *v.* Wise, 4 T. R. 366; Brown *v.* Mims, 2 Const. Rep. (S. C.) 235; Pearce *v.* Whale, 5 B. & C. 38.

[3] Goshen *v.* Stonington, 4 Conn. 209. As to justices and constables see Berryman *v.* Wise, 4 T. R. 366; Rex *v.* Gordon, 1 Lea. C. C. 515; Turner *v.* Fendall, 1 Cranch (U. S.), 117.

[4] Bunbury *v.* Matthews, 1 C. & K. 382.

[5] James *v.* Brown, 5 B. & Ald. 243.

[6] R. *v.* Howard, 1 M. & R. 187; R. *v.* Newton, 1 C. & K. 480.

[7] Butler *v.* Ford, 1 C. & M. 662.

[8] Cannell *v.* Curtis, 2 N. Cas. 228; M'Gahey *v.* Alston, 2 M. & W. 211.

[9] Porter *v.* Luther, 3 John. (N. Y.) 431.

property as deputy sheriff under an execution, and on trial offered to prove himself a general deputy of the sheriff, by reputation; the justice rejected the evidence, and required him to produce his appointment, and upon *certiorari*, the judgment was reversed upon this ground. The same principle has been applied to the case of magistrates. Thus in a Connecticut case[1] it appeared that a certain person had been appointed a justice of the peace, and to prove that he was duly qualified to act, a witness was offered to prove that he had issued a writ and received the duty upon it. This was held competent as *prima facie* proof, although the writ was not produced. So where a deed was produced which was acknowledged before a person styling himself a justice of the Common Pleas, it was held that it would be presumed that he was such, until the contrary was proved.[2] So, where a person executed a warrant directed to him as coroner, it was held that this was sufficient proof of his authority without the production of his commission.[3] So the celebration of a marriage by a person styling himself a minister of the gospel is *prima facie* proof of his authority to do so.[4] So, proof that the plaintiffs acted as officers of a revenue cutter was held sufficient, *prima facie*, in an action by them to recover their proportion of a forfeiture.[5] So it has been held that a person may be proved to be a collector and trustee of a school district by reputation;[6] and the same rule also applies to persons acting publicly as officers of a corporation.[7]

[1] Vernon *v.* East Hartford, 3 Conn. 475. See also Turner *v.* Field, 1 Cranch (U. S.), 117.

[2] Willink *v.* Miles, 1 Pet. (U. S. C. C.) 429; Clinton *v.* Beardsley, 38 Barb. (N. Y.) 29. But where a person justifies in an action for false imprisonment, upon the ground that he was a justice of the peace, and acting in his official capacity, it has been held that he is required to prove that he is not only *de facto*, but also *de jure* a justice of the peace, and, as his official character is directly in issue, he must establish it affirmatively. Newman *v.* Tiernan, 37 Barb. (N. Y.) 159. As to *quo warranto* proceedings, see People *v.* Cooke, 8 N. Y. 67; People *v.* Pearse, 27 N. Y. 45.

[3] Young *v.* Com., 6 Binn. (Penn.) 88.

[4] Goshen *v.* Stonington, 4 Conn. 209.

[5] Lawyer *v.* Steele, 3 Wash. (U. S. C. C.) 464.

[6] McCoy *v.* Curtice, 9 Wend. (N. Y.) 17.

[7] United States Bank *v.* Dandridge, 12 Wheat. (U. S.) 70.

How far this rule applies to professional men, suing or being sued as such, is not very definitely settled. In the case of attorneys,[1] clergymen,[2] and surgeons,[3] recoveries for or against them in that capacity have been upheld upon proof that they *acted* in that capacity, without proof that they were so in fact. But MR. TAYLOR, in his work upon Evidence, vol. 1, p. 182 (7th ed.), says: "These cases seem to rest not so much, if indeed at all, upon the presumption, as upon the ground that the opposite party had, by his admissions, either by word or deed, rendered it unnecessary to prove the actual appointment.[4] *In cases, therefore, where no such admission has been made*, the safer, if not the *necessary* course, will be to prove the appointment in the ordinary manner." Modern practice and recent decisions seem to require such proof. In an English case,[6] in an action brought by a physician for defamation, where the slanderous words *denied* the professional character of the plaintiff, proof that he had acted as such, coupled with evidence of a Scotch diploma, was held not sufficient to entitle him to a verdict. "No doubt," said LORD DENMAN, "a person complaining of a slander upon him in a particular character, must prove that he possesses that character when the slander does not admit it."

In the case last referred to, the court was equally divided upon the question whether proof of *acting* as physician was sufficient. But MANSFIELD and HEATH thought that the words of the slander, "Dr. Smith has upset all we have done, and die he (the patient) must," implied an admission of the character in which the plaintiff sued.[6]

[1] Berryman *v.* Wise, 4 T. R. 366.

[2] Bevan *v.* Williams, 3 T. R. 635, *n.* (*a*).

[3] Gremaine *v.* Le Clerk, &c., 2 Camp. 144.

[4] CHAMBERS, J., in Smith *v.* Taylor, 1 N. R. 210.

[5] Collins *v.* Carnigu, 1 Ad. & El. 695.

[6] It may be observed, however, on this case, that the question whether acting as a physician is sufficient *prima facie* proof of being one, was not directly decided, because the plaintiff, not content with resting his case on such evidence, proceeded to prove that he had received the degree of doctor of medicine from the University of St. Andrew's; and as the court held that this did not entitle him to practice in England, he could not, of course, fall back upon proof of practice upon the legality of which he himself had, by his

In such actions where the declaration states, as matter of inducement, that the plaintiff holds a certain office, or belongs to a certain trade or profession, no evidence is required to support the statement unless it is distinctly denied by the defendant's plea.

Enough has been said to illustrate the extent to which the rule is carried, and it is proper to say, with reference to the *effect* of this species of evidence, that, where the rights of third persons are concerned, it is generally sufficient for them to show that the officer through whom or by whose acts they claim, is so *de facto*, and the fact that he is not so *de jure* cannot be shown to defeat or prejudice their rights.[1]

As to the precise species of evidence necessary to show that a person is an officer *de facto*, which will preclude inquiry into the validity of his appointment or election, no definite general rule can be formulated from the authorities, as, from the nature of things, each case must largely depend upon its own peculiar circumstances. The mere claim to be a public officer, and the performance of a single, or even a number of acts in that character, will not necessarily in all

evidence, thrown doubt. In another action of slander, brought by a collector of tolls, the plaintiff was nonsuited on failing to prove his appointment to that office, but it does not appear that any evidence was offered that he ever acted in that capacity. Sellors *v.* Till, 4 B. & C. 655. And the same observation applies to the cases of Savage, 1 Doug. 356, *n.* (4), and Cortis *v.* Kent Waterworks Co., 7 B. & C. 314, in the former of which the plaintiff, who sued as a barrister, relied, not on his practice, but on the book of the Society of Lincoln's Inn, containing the order for his call; and in the latter, a party, suing in the character of treasurer to certain commissioners, proved his appointment to the office. Still, these cases, though not direct authorities, tend to show what the practice has been, and so far support the view that the rule which renders evidence of acting *prima facie* proof of due appointment, is confined to cases where the parties occupy a *public* situation, or, perhaps, where the question of appointment is *not directly* at issue. The case of R. *v.* Jones, 1 Lea. C. C. 74, where, on an indictment against an apprentice for a fraudulent enlistment, it was held that the indenture must be proved, is an authority on neither side of this question, for that decision rested on the ground that, as the *actual and legal* binding was the fact which constituted the gist of the offense, this could only be proved by the best evidence.

[1] Doty *v.* Gorham, 5 Pick. (Mass.) 487; People *v.* Collins, 7 John. (N. Y.) 549; Wilcox *v.* Smith, 5 Wend. (N. Y.) 231; Mason *v.* Dillingham, 5 Mass. 170; Fowler *v.* Beebe, 9 John. (N. Y.) 231.

cases constitute a person an officer *de facto*, but there must generally be some color of appointment or election, *or an acquiescence on the part of the public for a length of time which affords a presumption of such appointment or election.*[1] But where the person assuming to be an officer is himself a party to the suit, and the only individual to be injuriously affected by an inquiry into the validity of his official title, proof of acts by him as such officer is, *in his favor*, merely *prima facie* evidence of his being such.[2] But in actions *against* him, by proof of such acts, he is estopped from denying his official character.[3] It may be well here to say that an officer *de facto* is one whose acts, though he was not a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons; and this is done where the duties of the office were exercised: 1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be. 2. Under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent, requirement or condition, as to take an oath, give a bond, or the like. 3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. 4. Under color of an election or appointment by or pursuant to a public, unconstitutional law, before the same has been adjudged to be such.

The acts of an officer appointed by and acting under and pursuant to an unconstitutional law, performed before the unconstitutionality of the law has been judicially determined,

[1] Wilcox *v.* Smith, 5 Wend. (N. Y.) 231. See State *v.* Carroll, 38 Conn. 449, where it is held not necessary in all instances that there should be a color of appointment or election.

[2] Lawler *v.* Beebe, 9 Mass. 231; Cone *v.* Lawler, 10 id. 290.

[3] Hughes *v.* James, 3 J. J. Mar. (Ky.) 700.

are valid as respects the public and third persons, as the acts of an officer *de facto*.[1] In order to constitute a person such an officer he must be in the actual possession of the office and have the same under his control. If the officer *de jure* is in possession of the office — if the officer *de jure* is also the officer *de facto* — then no other person can be an officer *de facto* for that office. Two persons cannot be officers *de facto* for the same office at the same time.[2]

Sec. 79. Official sales.

Where a public officer is required to sell property, either at public or private sale, and as a condition precedent thereto certain steps are required to be taken, it will be presumed that all such conditions were complied with before such sale was made.[3] Thus, in the absence of proof to the contrary, a sheriff, at a sale of land under an execution, will be presumed to have complied with the requirements of the law in not selling more than was necessary to satisfy the execution, if the land was divisible.[4]

So where the record of a constable's sale is silent as to whether due notice was given of the sale or not, the court will presume that the constable did his duty.[5]

So, too, the presumption is that a sheriff who sells property on execution, has done his duty in previously making a levy, and the fact will be deemed to be admitted, if no objection is made at the trial;[6] and even where property is sold by a sheriff in another State, it will be presumed that the deed given is in conformity with the laws of that State, until the contrary is shown.[7]

Where a return shows a sale after appraisement, the latter will be presumed legal.[8]

So, too, although on a trial involving the validity of a

[1] State *v.* Carroll, *ante*.

[2] M'Cahon *v.* Commissioners, 8 Kan. 437.

[3] Hewitt *v.* Stephens, 5 La. An. 640; Culbertson *v.* Milhollin, 22 Ind. 362.

[4] Banks *v.* Bales, 16 Ind. 423.

[5] Culbertson *v.* Milhollin, 22 Ind. 362.

[6] Smith *v.* Hill, 22 Barb. (N. Y.) 656.

[7] Sadler *v.* Anderson, 17 Tex. 245.

[8] Waddell *v.* Judson, 12 La. Ann. 13.

tax sale, a part only of the requisite proofs are positive and direct, yet, if the suit is brought more than thirty years after the sale, the jury are at liberty to presume that the tax was duly authorized and assessed, and that all the other proceedings requisite to the validity of the sale were properly had.[1]

Sec. 80. Payment.

When the existence of a claim is once established, payment thereof is not presumed, except under peculiar circumstances, until after the lapse of twenty years. But the person pleading payment is bound to establish it,[2] and the mere circumstance that the creditor was poor or in embarrassed circumstances, and that the debtor was abundantly able to pay when the debt matured, will not of itself raise or support a presumption that the debt is paid,[3] although such evidence is admissible as bearing upon the question in connection with other circumstances; and it has been held that evidence showing that the debtor was poor and insolvent when the debt matured, and for a considerable period afterwards, tends to rebut the presumption of payment by the lapse of twenty years.[4] In cases where there is no statutory limitation, in the language of LORD ERSKINE,[5]

[1] Freeman *v.* Thayer, 33 Me. 76.

[2] Stockton *v.* Johnson, 6 B. Mon. (Ky.) 409; Clark *v.* Clements, 33 N. H. 563; McKinney *v.* Slack, 19 N. J. Eq. 164; McLendon *v* Hamblin, 34 Ala. 86; Buzzell *v.* Snell, 25 N. H. 474; Witherell *v.* Swan, 32 Me. 247; Caulfield *v.* Sanders, 17 Cal. 569; Yarnell *v.* Anderson, 14 Mo. 619; O'Brien *v.* Coulter, 2 Blackf. (Ind.) 421; Higginson *v.* Mein, 4 Cranch (U. S.), 420; Young *v.* Price, 2 Munf. (Va.) 534. This presumption has been applied in the case of *bonds*, Tinsley *v.* Anderson, 3 Call (Va.), 329; Durham *v.* Greenly, 2 Harr. (Del.) 124; Cottle *v.* Payne, 3 Day (Conn.), 289; Bartlett *v.* Bartlett, 9 N. H. 398; Haskell *v.* Keen, 2 N. & McC. (S. C.) 160; *taxes*, Calebrook *v.* Stewartson, 28 N. H. 75; Dalton *v.* Bethlehem, 20 id. 505; Andover *v.* Merrimac County, 28 id. 137; *judgments*, Kennedy *v.* Denoon, 3 Brev. (S. C.) 476; Burton *v.* Cannon, 5 Harr. (Del.) 13; *legacies*, Hayes *v.* Whitall, 13 N. J. Eq. 241; *mortgages*, Sweetser *v.* Lowell, 33 Me. 446; or any specialty debt, King *v.* Coulter, 2 Grant's Cas. (Penn.) 77; Shepard's Appeal, 2 id. 402; or debt or liability arising upon any contract, whether sealed or not. Clark *v.* Clement, 33 N. H. 563.

[3] Alexander *v.* Dutcher, 7 Hun (N. Y.), 439.

[4] Farmer's Bank *v.* Leonard, 4 Harr. (Del.) 536.

[5] In Hillary *v.* Waller, 12 Ves. 267.

"mankind, from the infirmity and necessity of their situation, must, for the preservation of their property and rights, have recourse to some general principle to take the place of individual and specific belief," and as a consequence, from the lapse of twenty years from its maturity, without proof of any circumstance to show that its existence was admitted or acknowledged, juries are to presume that a debt has been paid, whether it is evidenced by writing under seal or not; and, while the court itself cannot make such a presumption, a new trial will usually be granted if the jury disregards it.[1] This presumption being founded upon public policy, although a presumption of fact merely, is nevertheless regarded as of such force that the facts relied upon for its rebuttal must amount to more than mere belief deduced from the weight of testimony being on that side, and must be of such a character as would revive a debt barred by the Statute of Limitations.[2] "An admission simply," says WARDLAW, J.,[3] "that a debt has not been paid, will not be sufficient *unless it be an admission amounting to an acknowledgment of a subsisting liability like that which would renew a debt barred by the statute;*" and especially would this be the rule in those States where the statute provides that such a presumption shall be raised, and there would seem to be no good reason why the common-law presumption should not have the same force. "Presumptions," says HARPER, CH.,[4] "must be made against the well-known truth of the fact. If twenty years have elapsed without payment of interest, or any *acknowledgment* of a bond, we must presume it paid, *notwithstanding the fullest conviction that it never has been paid.*"[5] The law gives to this presumption an artificial and technical

[1] SIMPSON, C. J., in Boyce *v.* Lake, 17 S. C. 481. That the jury and not the court are to presume payment, see McBride *v.* Moore, Wright (Ohio), 524. Where a note and mortgage were executed in 1858, due in *one* year, and suit was not brought to enforce it until 1880, it was held that very slight evidence would sustain a finding of payment. Pattie *v.* Wilson, 25 Kan. 326. *Quære*, was *any* evidence beyond the mere lapse of time necessary?

[2] Boyce *v.* Lake, *ante;* Stover *v.* Duren, 3 Strobh. (S. C.) 500.

[3] In Stover *v.* Duren, *ante.*

[4] In Riddlehoover *v.* Kinand, 1 Hill (S. C.) Ch. 380.

[5] McQueen *v.* Fletcher, 4 Rich. (S. C.) Eq. 152; Pryor *v.* Wood, 31 Penn. St. 142.

weight beyond that which it would naturally have as a mere circumstance bearing on the question of payment, and the evidence must be of such facts and circumstances as fairly overcome it.[1] If a debt is payable by installments, the presumption attaches to each installment as it becomes due.[2] If, when the debt matured, the debtor was under any disability, proof of that fact will rebut the presumption,[3] as if he was absent from the State,[4] or an infant,[5] or from any cause in a situation so that he could not be sued by the creditor.[6] Presumptions of this class do not arise against the government.[7] To rebut the presumption of payment from the lapse of twenty years, it may be shown that the debtor *acknowledged* the indebtedness as existing within that time,[8] or that he was so situated that the claim could not have been enforced against him at law.[9]

[1] Walker *v.* Wright, 2 Jones (N. C.) L. 155; Herndon *v.* Bartlett, 7 T. B. Mon. (Ky.) 449; Morris *v.* Wadsworth, 17 Wend. (N. Y.) 103. A statement made by the surety of a debtor, after the debt had matured, that the creditor had agreed not to push him during his, the surety's, life-time, being proved, was held to rebut the presumption arising from the lapse of time. Fisher *v.* Phillips, 4 Baxt. (Tenn.) 243.

[2] State *v.* Lobb, 3 Harr. (Del.) 421.

[3] Daggett *v.* Tallman, 8 Conn. 168. The time during which the War of the Rebellion deranged the collection of debts, or during which there was an undertanding that payment should not be enforced, will not be reckoned as part of the twenty years. Hale *v.* Pack, 10 W. Va. 145.

[4] Daggett *v.* Tallman, *ante*.

[5] Bartlett *v.* Bartlett, 9 N. H. 398.

[6] Dunlap *v.* Vail, 2 Cranch (U. S.), 180.

[7] United States *v.* Williams, 4 McLean (U. S.), 567.

[8] Arline *v.* Miller, 22 Ga. 320; Nixon *v.* Bynum, 1 Bailey (S. C.), 148; Livingston *v.* Livingston, 4 John. Ch. (N. Y.) 294.

[9] Bailey *v.* Jackson, 16 John. (N. Y.) 210. The presumption of payment may be repelled by various circumstances, as by an admission of the debt within twenty years, McDowell *v.* McCullough, 17 S. & R. (Penn.) 51; Cattle *v.* Payne, 3 Day (Conn.), 289; North *v.* Drayton, 1 Harp. Ch. (S. C.) 34; Goldhawk *v.* Durne, 2 Wash. (U. S. C. C.) 323; by the payment of a part of the debt, either principal or interest, Sanders *v.* Meredith, 3 M. & R. 116; Brearden *v.* Searcey, 3 Marsh. 544; or a promise to pay within twenty years, Eustace *v.* Gaskins, 1 Wash. (U. S. C. C.) 188. But the admission must be made in explicit terms, Haskell *v.* Keen, 2 N. R. McCord (S. C.), 166; or by the debtor himself, or some person having competent authority to bind him. Thus neither an admission or part payment by an heir-at-law, will be operative as against an executor of the estate, Blake *v.* Quash, 3 McCord (S. C.), 346; Os-

Instances may arise where payment may be presumed from the lapse of a less period than twenty years, *when there are other facts and circumstances which, taken in connection with such delay in enforcing the claim, fairly support such a presumption*;[1] and in all such cases it is for the jury to judge of

good *v.* Manhattan Co., 3 Cow. (N. Y.) 611; nor will the admission of one joint obligor deprive the others of the benefit of the presumption. Haskell *v.* Keen, *ante*. The insolvency of the debtor may be shown, or his poverty or inability to pay, Boardman *v.* De Forest, 5 Conn. 1; Fladlong *v.* Winter, 19 Ves. 196; Daggett *v.* Tallman, 8 Conn. 168; Waddell *v.* Elmendorf, 10 N. Y. 170; but the insolvency of *one* of several joint debtors is not sufficient to repel the presumption. Boardman *v.* De Forest, *ante*. Or it may be shown that the parties were near relatives, 12 Ves. 266; or that the debtor was permanently absent from the State, Shields *v.* Pringle, 2 Bibb (Ky.), 387; but merely occasional or temporary absences are not sufficient, Boardman *v.* De Forest, *ante;* nor is the absence of *one* only of two or more joint debtors, id.; or indeed any facts or circumstances which excuse delay, and show that the debt was not in fact paid, as that the bond was wrongfully obtained by a third person, in an answer, Boltz *v.* Bullman, 1 Yeates (Penn.), 584; or that the obligee died, leaving the bond with his attorney, who did not deliver it to the personal representatives, it not appearing that they knew of it. Jackson *v.* Hotchkiss, 6 Cow. (N. Y.) 401. So, that the obligor was the obligee's executor, North *v.* Drayton, 1 Harp. Ch. (S. C.) 34; or that the obligee's representative had long been engaged in procuring evidence to establish the claim, id. The presumption is liable to be rebutted and overcome by proof of any facts and circumstances, the legitimate tendency of which is to render it more probable than otherwise, in the minds of the jury, that payment has not in fact been made; and the question is one of pure fact for the jury, and any evidence tending to satisfy them that no payment has actually been made, is competent and admissible. Grantham *v.* Canaan, 38 N. H. 268. Until rebutted or dispelled by evidence, it has all the force and effect of plenary proof, and the jury are not allowed to disregard it. Thompson *v.* Thompson, 2 Head. (Tenn.) 405. In the case of a payment, which is relied upon to repel the presumption, it cannot now be proved by a mere indorsement made by the payee, at least, unless it was made at such a time anterior to the attaching of the presumption as to make it an admission against his interest, and to repel all suspicions of it having been made merely for the purpose of keeping the debt on foot, Roseboom *v.* Billings, 17 John. (N. Y.) 184; and an indorsement made by the payee *after* the presumption has no effect as proof. Roseboom *v.* Billings, *ante*.

[1] Atkinson *v.* Dance, 9 Yerg. (Tenn.) 424; Tilghman *v.* Fisher, 9 Watts (Penn.), 411; Fleming *v.* Emory, 5 Harr. (Del.) 46; Blake *v.* Quash, 3 McCord (S. C.), 340; Walten *v.* Harrison, 9 La. An. 234; Milledge *v.* Gardner, 33 Ga. 397. The character of the plaintiff for promptness in collecting debts due him as well as of the defendant in paying may be given in evidence as

the weight of the presumption.[1] Thus, it may be shown that the plaintiff was poor, and the debtor of undoubted solvency during the period which has elapsed since the debt matured; and where delay in bringing suit was for a long period, although less than twenty years—as in one case, seventeen years—although such evidence is not *per se* sufficient to raise a presumption of payment, yet, in the absence of any demand or recognition of the debt, or partial payment of principal or interest, *is a persuasive circumstance, and may, when slightly corroborated, be sufficient evidence of payment.*[2] *But mere lapse of time* for a period less than twenty years, although it is shown that the debtor was, during all such time, solvent and able to pay, does not warrant the presumption.[3] This artificial presumption of payment no more permits a jury to give to a shorter time a force beyond its natural efficacy in producing belief, than the bar under the

a circumstance tending to show that a debt has been paid in a less time than twenty years. Leiper *v.* Erwin, 5 Yerg. (Tenn.) 97; Brubaker *v.* Taylor, 76 Penn. St. 83.

[1] Waters *v.* Waters, 1 Met. (Ky) 519.

[2] Briggs' Appeal, 93 Penn. St. 485; Moore *v.* Pague, 1 Den. (Ky.) 327; Blackburn *v.* Squab, Peck (Tenn.), 60. In Bender *v.* Snyder, 5 Barb. (N. Y.) 63, the lapse of fourteen years after the last installment upon a bond or mortgage became due, taken in connection with other circumstances, was held sufficient to raise the presumption that the bond and mortgage was paid. In McDaniel *v.* Goodall, 2 Caldw. (Tenn.) 391, the lapse of sixteen years after a decree or judgment had been obtained, *with no demand or payment of principal or interest, and no attempt to enforce collection,* was held sufficient to raise a presumption of payment; and in Thompson *v.* Thompson, 2 Head. (Tenn.) 405, the same rule was applied to a bond. Lapse of time is a circumstance which, taken in connection with others, may warrant an inference that a debt has been paid, although less than twenty years, and its value as a circumstance is in proportion to the length of time which has elasped since the debt became due. Walker *v.* Emerson, 20 Tex. 706. See Gould *v.* White, 26 N. H. 178; Baker *v.* Stonebroker, 36 Mo. 338, for instances in which specialty debts were presumed to have been paid by a lapse of time less than twenty years in connection with other circumstances.

[3] Daly *v.* Erricsson, 45 N. H. 786; Thomas *v.* Hunnicott, 54 Ga. 337. In order to repel a presumption of payment arising from the lapse of time because of the insolvency of the debtor, such a state of insolvency on his part must be shown *during the whole period as proves that he did not pay because he could not.* Grant *v.* Burgwyn, 84 N. C. 560.

Statute of Limitations permits a nearer approach to the statutory period to avail.[1]

And in those cases where a shorter period has been permitted to support such a presumption, it will be found that such lapse of time was aided by other circumstances,[2] or the statute, as is the case in some of the States, provides a shorter period. *The possession of the evidences of a debt by the payer, after maturity, affords prima facie evidence of its payment by him*, as of a bill of exchange by the drawee,[3] of a bond by the obligor[4] of a note in the hands of the maker.[5] But the presumption arising from this circumstance may be rebutted, by showing that such evidences of debt were placed in the hands of the debtor for a special purpose, or that he came into their possession by mistake or without the consent of the payee.[6] The payment of a *subsequent* debt always raises the presumption that prior debts have been paid.[7] Thus, in the case last cited, where *three* notes were secured by a mortgage, and the two last due were shown to have been sued and

[1] Smithpeter *v.* Ison, 4 Rich. (S. C.) 203. Lapse of time, *although only one day less than twenty years*, will not of itself warrant a presumption of payment, but when coupled with other circumstances the jury may find the fact of payment therefrom, although a plea setting up the presumptive payment has not been filed. Sadler *v.* Kennedy, 11 W. Va. 187; Caldwell *v.* Prindle, 11 id. 397. Payment of a judgment may be presumed from the lapse of less than twenty years when there are persuasive circumstances which can be submitted to the jury in connection with it. Moore *v.* Smith, 81 Penn. St. 182; Garnier *v.* Renner, 51 Ind. 372.

[2] Pitkin *v.* Kent, 1 Root (Conn.), 312; Winstanley *v.* Savage, 2 McCord (S. C.) Ch. 435; Diamond *v.* Tobias, 12 Penn. St. 312; Bailey *v.* Gould, Walker (Mich.), 478; Wightman *v.* Butler, 2 Spears (S. C.), 357.

[3] Hill *v.* Gayle, 1 Ala. 275; Close *v.* Field, 2 Tex. 232.

[4] Day *v.* Clarke, 1 A. K. Mar. (Ky.) 521.

[5] Alvord *v.* Baker, 9 Wend. (N. Y.) 323; Weidner *v.* Schweigart, 9 S. & R. (Penn.) 385; Garlock *v.* Geortum, 7 Wend. (N. Y.) 198; Egg *v.* Barnet, 3 E. & P. 196.

[6] Banks *v.* Marshal, 23 Cal. 223. Checks drawn by the president of a corporation upon the treasurer in favor of contractor, and found in the possession of the treasurer, or in the archives of the corporation, are *prima facie* evidence that they have been paid, the work under the contract having been done; and the same rule applies to all cases of evidences of debt. Union Canal Co. *v.* Lloyd, 4 W. & S. (Penn.) 393. The possession of acceptances by the persons making them raises a presumption that they are paid. Hays *v.* Samuels, 55 Tex. 560.

[7] Matthews *v.* Light, 40 Me. 394.

recovered, it was held that in the absence of opposing proof, after the lapse of thirty years, the presumption was irresistible.

So, where a broker rendered his accounts to his principal, and no mention was made therein for a claim of which the principal was liable, as joint debtor, it was held that the presumption was that such claim had been paid, and that this presumption must be overcome before the broker could recover thereon.[1]

A strong illustration of this rule is found in the case of actions for rent, by a landlord against his tenant. In such cases a receipt for the payment of the rent last accruing raises a presumption that all previous rent has been paid.[2] So, where an employer has been in the habit of paying his employees regularly every week or month, the receipt of the wages accruing for the last week or month affords presumptive evidence that his previous wages have been paid,[3] and the same has been held where a servant had left his employer's service for a considerable time before a claim for a balance of wages has been made.[4] So, where an agent is shown to have been in the habit of accounting to his principal at regular stated periods for money received by him for his principal, it will be presumed that he has so accounted, and the onus of proving the contrary is upon the principal;[5] and in the case of factors and commission merchants it will, after reasonable time — though less than twenty years — be presumed that they have accounted for the proceeds of

[1] Smith *v.* Tucker, 2 E. D. S. (N. Y. C. P.) 193. See, also, Bushee *v.* Allen, 31 Vt. 631, where the fact that an item of book account was not alluded to or considered at the time of a settlement of accounts between the parties, and no excuse for not having alluded to such item was given upon the trial of an action to recover such item, was held to constitute strong evidence against the justice of the claim, but not to amount to an actual bar to its recovery.

[2] Patterson *v.* O'Hara, 2 E. D. S. (N. Y. C. P.) 58; Gilbert on Ev. 157; Bremer *v.* Knapp, 1 Pick. (Mass.) 337. Payment of rent reserved in a perpetual lease, or conveyance in form, may be presumed after the lapse of twenty years, but the non-payment for more than that period does not raise a presumption that the covenant to pay rent has been released and discharged. Lyon *v.* Odell, 65 N. Y. 28.

[3] Lucas *v.* Novosilieski, 1 Esp 296.

[4] Seller *v.* Norman, 4 C. & P. 80.

[5] Evans *v.* Birch, 3 Camp. 10.

goods consigned to them for sale.[1] The return of an execution as satisfied raises a presumption that the money was received by the plaintiff.[2] In all cases where previous year's taxes remaining unpaid are required to be carried forward to the next year, the failure to carry forward the tax of a previous year raises a presumption that such previous year's tax is paid.[3] Where an attachment of property is made upon *mesne* process, and the record fails to show that this was followed by a levy of the execution, a presumption is thereby raised that the debt was paid.[4] From the circumstance that a promissory note is given by one person to another, it will be presumed that the payee was not at that time indebted to the maker,[5] and that all claims in favor of the maker against the payee were adjusted at that time;[6] but this presumption is only *prima facie* in its effect, and may be rebutted by showing that the payee was in fact indebted to the maker, or that the note was given for an independent transaction, not affecting existing debts between the parties.[7] There is no presumption that goods sold are paid for on delivery, nor can such a presumption be raised from the circumstance that the sellers sent to the buyer an unreceipted bill, upon which was written or printed the words, "Terms cash."[8]

Sec. 81. As to Title.

As has already been stated, the presumption is, that the title to property is in the person in whose possession it is found,[9] unless there are circumstances connected with such

[1] Lapham *v.* Braddick, 1 Taunt. 572

[2] Boyd *v.* Foot, 5 Bos. (N. Y.) 110.

[3] Attleboro *v.* Middleboro, 10 Pick (Mass.) 378.

[4] Benson *v.* Benson, 24 Miss. 625. For the species of proof requisite to establish a payment, as well as what constitutes a payment, see chap. , "Payment."

[5] Gould *v.* Chase, 16 John. (N. Y.) 226; De Freest *v.* Bloomingdale, 5 Den. (N. Y.) 304.

[6] Lake *v.* Tysen, 6 N. Y. 461.

[7] Duguid *v.* Ogilvie, 3 E. D. S. (N. Y. C. P.) 527. As to the presumption of payment of mortgages, legacies, etc., see those heads.

[8] Wellauer *v.* Fellows, 48 Wis. 105.

[9] Drummond *v.* Hopper, 4 Harr. (Del.) 327; Finch *v.* Alston, 2 S. & P. (Ala.) 83; Entriken *v.* Brown, 32 Penn. St. 364; Vining *v.* Baker, 53 Me. 544; Sparks *v.* Rawls, 17 Ala. 211; Goodwin *v.* Garr, 8 Cal. 615; Fish

possession as overcome this presumption, and should put third persons upon inquiry,[1] and this is the rule both as to real or personal property. In the case of lands, as between the person in possession and a third person having no valid title thereto, such possession prevails as evidence of title, until a better title is established in the other; but when a better title is established, the party in possession must prove his title.[2] The rule relative to lands may be said to be that where the rights of two hostile parties stand upon mere possession not yet ripened into a perfect title, he who has the prior possession has the best right, with the qualification that, if the party having the prior possession abandons and surrenders it to the adverse party, he cannot afterward set it up.[3] And, in favor of long possession, almost every variety of written evidence will be presumed, and the defective links in the chain of title will be supplied by presumption, and the title declared perfect, when the possession has continued for a great length of time.[4]

But where property, real or personal, is found in the pos-

v. Skut, 21 Barb. (N. Y.) 333; Millay *v.* Butts, 35 Me. 139. Property found in the possession of a deceased person is presumed to belong to the estate until the contrary is proved. Succession of Alexander, 18 La. An. 337. Where goods are taken upon execution while in the actual possession of the defendant in the execution, and are replevied by a person claiming to be the owner thereof, the burden of proving that they are his property rests upon the plaintiff; but if the goods were in the possession of another, at the time of the levy, the burden is cast upon the officer making the levy of proving property in the defendant in the execution. Merritt *v.* Lyon, 3 Barb. (N. Y.) 110. So where property has been sold on execution, evidence that the defendant, at the time of the levy, and for eighteen months before, had the property in his possession, hired it out and otherwise enjoyed the use of it, and that a claimant was present at the sale, making no objection, is *prima facie* evidence of property in the defendant in execution. Bordine *v.* Combs, 15 N. J. L. (3 Green), 412. In an action by a party holding sheep as estrays, for their alleged conversion, the burden is on the defendant to show that by ownership or otherwise he was entitled to take the sheep. Hendricks *v.* Decker, 35 Barb. (N. Y.) 298.

[1] Austin *v.* Bailey, 37 Vt. 219; Calvin *v.* Warford, 20 Md. 357.

[2] Wendell *v.* Blanchard, 2 N. H. 456; Rachell *v.* Holmes, 2 Bay (S. C.), 487.

[3] Austin *v.* Bailey, 37 Vt. 219; Clifton *v.* Lilly, 12 Tex. 130.

[4] Nixon *v.* Carco, 28 Miss. 414.

session of several persons, the law refers the possession to him who has the ownership.[1]

In the case of personal property the presumption of title arising from possession may be rebutted by showing that it was held as bailee, or in a subordinate capacity,[2] as, that it is held as a servant or agent for the real owner. Thus it was held that the presumption of title raised by possession of a regular warehouse receipt, the plaintiffs alleging that they derived title from the defendants, is not rebutted by proof that the defendants once owned, and that the person to whom, in his own name, the receipt was given, was the defendant's agent.[3]

Where property is sold and there is no evidence as to whether the vendor had the possession of it at the time of sale, it will be presumed that he had such possession.[4]

Where goods are sold without any special contract as to credit, although the vendor is not obliged to deliver them until they are paid for, yet from the mere circumstance of delivery it will not be presumed that they were paid for, nor will the circumstance that an unreceipted bill was sent to the vendee by the vendor, upon which was written or printed the words, "Terms cash," raise such a presumption.[5]

Sec. 82. Miscellaneous Presumptions.

Presumptions may arise from artificial habits; as the course of trade; the course of the post; the customs of a particular trade, or of a particular class of people. In this way, the time of credit, the time when a letter was received,

[1] Lenoir *v.* Rainey, 15 Ala. 667; Maples *v.* Maples, Rice (S. C.) Ch. 300; Miller *v.* Fraley, 23 Ark. 735; Ganenor *v.* Campbell, 17 Ala. 566.

[2] Linscott *v.* Trask, 35 Me. 139.

[3] Horr *v.* Barker, 8 Cal. 609. In replevin for certain hogs, taken by the defendant, as deputy sheriff, on an execution against A., the court charged the jury that, if A. was found in the possession of the hogs, he would be presumed to be the owner; but that this presumption would yield to proof, and that any proof would be sufficient if it produced belief in the minds of the jury that the title was in another. Held, that this charge was correct. Park *v.* Harrison, 8 Humph. (Tenn.) 412.

[4] Lang *v.* Hickingbottom, 28 Miss. 772.

[5] Willaner *v.* Fellows, 48 Wis. 105.

etc., etc., may be proved, and stand so until rebutted.[1] The reliance on the course of the post is most conspicuous in suits to charge drawers and indorsers of commercial paper.[2] The course and custom of trades and classes run through every department of society, giving a construction to their words and conduct, and charging them with notice and knowledge. It has been held that the officers of an insurance company should be presumed to be cognizant of the marine intelligence contained in a newspaper taken at the office, especially that which relates to their own port.[3] So, that a client, resident abroad, has left all material papers with his attorney, who defends his cause in England; but not if he resides in England; and in no case, if the paper is not obviously material.[4] So, that all the partners may have access to and know the contents of partnership books, though this may be repelled by circumstances.[5] So, that a bank stockholder is entitled to a certificate of ownership, as it is the habit of nearly all banks to give this.[6] Presumptions also arise from the state of society. In a slaveholding State, formerly, a person bearing a black complexion was presumed to be a slave; though otherwise of a yellow or mulatto.[7] While in New York, where slavery yet barely lingered, and a majority of blacks were free, the same presumption was denied, even from a plain African color and features.[8] The wife, in the husband's absence, is presumed to have been left an agent for the hiring out of his horses.[9] A servant by the year having left her service a considerable time, the presumption, in England, is that her wages were paid.[10] *A fortiori* when the service is in a factory, where the custom is to pay weekly.[11]

[1] 1 Stark. Ev. 356. And see 2 Ev. Poth. 334, No. 16, § 14.

[2] De Forest *v.* Hunt, 8 Conn. 179.

[3] Green *v.* Merch. Ins. Co. of New Bedford, 10 Pick. (Mass.) 402.

[4] Vice *v.* Anson, 3 C. & P. 19.

[5] United States Bank *v.* Binney, 5 Mas. (U. S.) 176.

[6] Hussey *v.* Man. & Mech. Bank of Nantucket, 10 Pick. (Mass.) 415.

[7] Scott *v.* Williams, 1 Dev. (N. C.) 336.

[8] Rogers *v.* Berry, Wash. Circ. June, 1812, *Cor.* YATES, J., MS.; S. C., but not S. P., 10 John. (N. Y.) 132.

[9] Church *v.* Landers, 10 Wend. (N. Y.) 79, 80.

[10] Sellen *v.* Norman, 4 C. & P. 80.

[11] Note *a* to Sellen *v.* Norman, *supra*.

The latter case comes rather to the practice of individuals, concerning which there are various cases. Only some few of the modern ones will be given. A man allowing his friend repeatedly to forge his name upon commercial paper, by submitting to have the paper enforced, is held incapable of defending against subsequent forgeries.[1] The habit of the retailer to charge interest after ninety days is held to bind the customer, who shall be presumed to know the habit.[2] So, the practice of a porter to a bank as to the time of presenting checks.[3] The practice of clerks in a counting-house as to mailing letters.[4] And the habit of an attorney's office, as to the preparation and service of notices to quit.[5]

From the custom of parents to furnish their daughters, on marriage, with outfits, the delivery of property by a parent to a daughter, on the occasion of her marriage, without explanation, will be presumed to be a gift.[6] So, if some time after marriage.[7]

So things are held to be legally and properly in their existing state, until the contrary is shown; as if a person is in possession of property, the presumption is that he is the rightful owner.[8]

So the law presumes that a fact continuous in its character,

[1] Weed *v.* Carpenter, 4 Wend. (N. Y.) 219.

[2] M'Allister *v.* Reab, 4 Wend. (N. Y.) 483, 490.

[3] Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443.

[4] Toosey *v.* Williams, 1 M. & M. 129.

[5] Patteshall *v.* Turford, 3 B. & Ad. 890.

[6] Smith *v.* Montgomery, 5 Mon. (Ky.) 502; Bell *v.* Strother, 3 McCord (S. C.), 207, 210; Johnson *v.* Dilliard, 1 Bay (S. C.), 232; Teague *v.* Griffin, 2 Nott & McCord (S. C.), 93; De Graffenried *v.* Mitchell, 3 McCord (S. C.), 506; Byrd *v.* Ward, 4 McCord (S. C.), 228.

[7] M'Cluney *v.* Lockhart, 4 McCord (S. C.), 251. See 1 Dom. b. 13, tit. 6, § 4, art. 7, that persons shall be presumed to act according to their principles and customs.

[8] 2 Ev. Poth. 333, No. 16, § 14; 1 Dom. b. 3, tit. 6, § 4, art. 1; Livingston *v.* The Peru Iron Co., 9 Wend. (N. Y.) 520, 521; Bell *v.* Com., 1 J. J. Marsh. (Ky.) 550; Fowke *v.* Darnell, 5 Litt. (Ky.) 319; Cook *v.* Wilson, Litt. Sel. Cas. (N. Y.) 439; Schermerhorn *v.* Van Volkenburgh, 11 John. (N. Y.) 529; Jackson *ex dem.* Glover *v.* Winslow, 9 Cow. (N. Y.) 13; Jackson *ex dem.* Klock *v.* Rightmyre, 10 John. (N. Y.) 314; Smith *v.* Lorillard, 10 John. (N. Y.) 338; Ricard *v.* Williams, 7 Wheat. (U. S.) 59; Jackson *ex dem.* Williams *v.* Miller, 6 Cow. (N. Y.) 751; Campbell *v.* Roberts, 3 Marsh. (Ky.) 623; Riley *v.* Million, 4 J. J. Marsh. (Ky.) 395.

still continues to exist, until a change is shown; as a partnership;[1] or, within certain limits, that a life continues.[2] So that a legal or actual possession continues.[3] That a corporation continues to exist.[4] That an entry and ouster by a landlord upon his tenants continues, till a restoration is shown.[5]

Yet a written admission that the defendant was editor on one day, was held at Nisi Prius no evidence that he was editor on a subsequent day.[6] And admitting insolvency at one time was denied as evidence that it existed considerable time after.[7]

Bad character is presumed to continue; and a gambler to continue a gambler.[8]

So, everything which happens naturally and commonly is taken as true; as that a father loves his children.[9] So of fraternal affection, for where a younger brother entered on the land which descended to the elder brother, in his absence, this was held not to be adverse, because of the relation between them.[10] So of things happening naturally; a collateral relation claiming by descent from a decedent advanced in life, must prove that he died *without issue*, which will not be presumed.[11] And on the other hand, so amply have medical science and general observation borne testimony to the obstinacy of a settled or habitual derangement of the intellect, that *semel furandibus semper furandibus, præsumitur.*[12]

[1] 1 Stark. Ev. 36.

[2] Innes *v.* Campbell, 1 Rawle (Penn.), 373. And see 2 Ev. Poth. 333, No. 16, § 14.

[3] Bayard's Lessee *v.* Colefax, 4 Wash. (U. S. C. C.) 38.

[4] People *v.* Manhattan Co., 9 Wend. (N. Y.) 351.

[5] Lewis v. Paine, 4 Wend. (N. Y.) 423, 429. And see Miller *v.* Porter, 4 Wend. (N. Y.) 672.

[6] Macleod *v.* Wakely, 3 C. & P. 311.

[7] Hume *v.* Long, 6 Mon. (Ky.) 116.

[8] McMahon *v.* Harrison, 6 N. Y. 443.

[9] 1 Dom. b. 3, tit. 6, § 4, art. 7.

[10] Gilb. Ten. 28; Magow's Case, Latch, 68.

[11] Dudley *v.* Grayson, 6 Mon. (Ky.) 259.

[12] Stevens *v.* Van Cleve, 4 Wash. (U. S. C. C.) 262; Van Dusen *v.* Van Dusen, 5 John. (N. Y.) 144; Cadwell *v.* King, 4 Cow. (N. Y.) 207; Attorney-General *v.* Paruther, 3 Bro. (U. S. C. C.) 441, 443; White *v.* Wilson, 13 Ves. 87, 88; Hoge *v.* Fisher, 1 Pet. (U. S. C. C.) 163; Vance *v.* Com., 2 Va. Cas. 132; Lee *v.* Lee, 4 M'Cord (S. C.), 189; Kinloch *v.* Palmer, 1 Rep. Const. Ct. (S. C.) 225.

Innocence, as being the more natural and usual state, is always presumed, until rebutted.[1] And so that a wife accompanying her husband in the commission of crime, acts under his coercion, and consequently without a guilty intent.[2] So a minor is presumed to be under the control and protection of the parent, even though such minor is out at hired service.[3]

So every one is presumed to take care of his own concerns.[4] Hence the owner and vendor will be presumed to know of obvious defects in the things sold; *e. g.*, the adverse possession of his land by another.[5] It is also a presumption that he who pays is indebted.[6] Thus a person accepting and paying a check has, *prima facie*, funds of the drawer to that amount.[7] A gift is not to be presumed. Thus, though payment may be presumed after twenty years, yet that being repelled, the law will not presume the debt forgiven.[8] The law presumes that a prebendary *de facto* had performed the requisites to make him so.[9]

Another fruitful subdivision of presumption from what is natural and usual, sanctioned both in the civil and common law, is the rule that every one governs himself by the rules of right reason, and consequently acquits himself of his engagements and his duty.[10] This rule extends to every man, both in his official and private character.[11]

As to official acts, the legal presumption is, that the surveyor, register, governor and secretary of State have done their duty in regard to the several acts necessary to be done by them in granting lands; and therefore, surveys and patents should always be received as *prima facie* evidence of correct-

[1] 2 Ev. Poth. No. 16, § 14.

[2] Rex *v.* Knight, 4 C. & P. 116.

[3] Millar *v.* Thompson, 1 Wend. (N. Y.) 447.

[4] 1 Dom. b. 3, tit. 6, § 4, art. 7.

[5] Lane *v.* Shears, 1 Wend. (N. Y.) 433.

[6] 1 Dom. b. 3, tit. 6, § 4, art. 7, 10; James *v.* Biou, 2 Sim. & Stu. 606.

[7] State Bank of North Carolina *v.* Clark, 1 Hawks (N. C.), 36.

[8] Potter *v.* Titcomb, 7 Me. 302.

[9] Dr. Sherard's Case, cited 2 Bl. 853.

[10] 1 Dom. b. 3, tit. 6, § 4, art. 7.

[11] Bank of the U. S. *v.* Dandridge, 12 Wheat. (U. S.) 69, 70. And see Ballou *v.* Campbell, 5 Wend. (N. Y.) 572; Colvin *v.* Carter, 4 Ham. (Ohio) 354; Fridge *v.* The State, 3 G. & J. (Md.) 103; Whittlesey *v.* Starr, 8 Conn. 134; Truwhit *v.* Dupree, 2 C. & P. 557.

ness.[1] An agreement of counsel made in the course of a cause will be presumed to have been made on proper authority from the client.[2] So, that a sheriff selling horses on execution had levied on them.[3] So, that overseers of the poor have taken the proper steps for the relief of a pauper;[4] that a board of supervisors have complied with the law in its proceedings to erect a new town;[5] that officers of government would not twice survey and patent the same lands;[6] that an assessed tax on certain land was imposed upon the possessor at the time, or other person bound legally to pay;[7] that a district attorney has filed the transcript of a conviction in the Court of Exchequer as required by statute;[8] that a register's sale was duly advertised;[9] that a sheriff's sale was according to his duty;[10] that he returned the execution in due time;[11] that he gave due notice of sale;[12] that he held a *ca. sa.* the proper length of time to charge bail.[13] That a rector in possession had read the thirty-nine articles, will be presumed.[14] So, that a man acting in a public office has been rightfully appointed, as one acting as a surrogate.[15] So, that entries made in public books were made by the proper officers; that officers issuing a land patent had the requisite warrant, plat and certificate;[16] that a government surveyor did his legal duty by surveying on the ground.[17] A record

[1] Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 447.

[2] Ellworthy *v.* Bird, 1 T. R. 33.

[3] Hartwell *v.* Root, 19 John. (N. Y.) 345; Marsh *v.* Lawrence, 4 Cow. (N. Y.) 461.

[4] Minklaer *v.* Rockfeller, 6 Cow. (N. Y.) 276.

[5] People *v.* Carpenter, 24 N. Y. 86.

[6] Woodson *v.* Bufford, 7 Mon. (Ky.) 418.

[7] Rex *v.* Inhabitants of St. Lawrence, 4 Doug. 190; Rex *v.* Inhabitants of St. James, 4 Doug. 200.

[8] Hilts *v.* Colvin, 14 John. (N. Y.) 182.

[9] Hickman *v.* Skinner, 3 Mon. (Ky.) 211.

[10] Terry *v.* Bleight, 3 Mon. (Ky.) 271.

[11] Maury *v.* Cooper, 3 J. J. Marsh. (Ky.) 226.

[12] Hanson *v.* Barnes, 3 G. & J. (Md.) 359.

[13] Wheelock *v.* Hall, 3 N. H. 310.

[14] Monk *v.* Butler, 1 Roll. 83. And see 2 Anst. 372.

[15] Rex *v.* Verelst, 3 Camp. 432. And see Bishop *v.* Cone, 3 N. H. 513, and People *v.* Gilbert, Anth. N. P. (N. Y.) 191.

[16] Hickman *v.* Boffman, Hard. (Ky.) 362.

[17] Philips *v.* Robertson, 2 Tenn. 421.

stated a tax to have been reported as assessed; this will be intended to be the report of the man who was sheriff at the time it was assessed, as the duty belonged to him.[1] So, that the auditor of the exchequer, on his removal, had delivered up the rolls.[2] So, that a constable delivering an execution for renewal, held it long enough to levy and collect according to law;[3] that a tax collector sold no more land than was necessary to pay the tax;[4] that the certificate of appraisal was in the hands of the sheriff before he set off the land under the *fi. fa.*;[5] and that an officer commissioned by the governor was duly nominated.[6]

In one case, where a sheriff received money on a *fi. fa.* after the return day, having received one installment before, the court were asked to presume that he levied on the debtor's property before the return day, which act alone could give him power officially to receive money afterwards; but they would not presume that, saying, that where a fact is necessary to confer authority, it is not to be presumed, although every proper official step will be presumed after authority is shown.[7]

Transactions of a private or unofficial character are interpreted by the same lenient rules of presumption. *Odiosa et inhonesta non sunt præsumenda;*[8] *Injuria non præsumuntur;*[9] *Omnia præsumuntur legitime facta, donec probetur in contrarium;*[10] *Fraus est odiosa, et non præsumenda,*[11] are maxims of daily application in our courts, both of civil and criminal jurisdiction, to every diversity of human action which is not itself of such a character as to pronounce its own condemnation. A party having a legal right, enters upon land; the law presumes that he enters with a view to that right, and not with a wrongful intention.[12] So, that a

[1] Bush *v.* Williams, 1 Coke, 360.
[2] Lord Halifax's Case, Bull. N. P. 298.
[3] Wilson *v.* Gale, 4 Wend. (N. Y.) 623.
[4] Ives *v.* Lynn, 7 Conn. 505.
[5] Booth *v.* Booth, 7 Conn. 350.
[6] Commonwealth *v.* Frazier, 4 Mon. (Ky.) 513.
[7] Rudd *v.* Johnson, 5 Litt. (Ky.) 19.
[8] 10 Rep. 56, a.
[9] Co. Litt. 232, b.
[10] Co. Litt. 232, b.
[11] Cro. Car. 550.
[12] Benson *v.* Bolles, 8 Wend. (N. Y.) 175.

deed of a trustee having power to convey upon a certain contingency, was not given until after the condition happened;[1] and generally that a trustee has faithfully executed his trust.[2] And so against every act of immorality.[3] Equally so against acts of negligence; for where it was sought to charge the defendant with having placed a dangerous commodity on board a ship without due notice to the captain, it was held that the want of notice should not be presumed, but the contrary.[4] And there cannot be a doubt that negligence in most of the different descriptions of bailees should never be presumed.[5] So, when a vessel is in her usual business, it will be presumed that the master is on board, that being his duty.[6]

If, after every effort to establish fraud, it remains doubtful upon the proof, innocence is to be presumed.[7] So the presumption is against the breach of a positive law. By an English statute, letters not sent with, and respecting packages, must be mailed, and cannot be sent by private post. It appearing that a letter was with the package in the parcel sent, the court presumed that it had respect to the parcel, inasmuch as the contrary would be to violate the act of parliament.[8] Upon the authority of the last case it was afterwards held that an importer will be presumed to have caused his goods to be entered at the custom house according to law.[9] So strong is this presumption, that where a woman married within twelve months after her first husband was last heard of, his death was presumed.[10] So, evidence that a theatre has gone on to perform without interruption authorizes the pre-

[1] Morrison *v.* M'Millan, 4 Litt. (Ky.) 210.

[2] Shilknecht *v.* Eastburn, 2 G. & J. (Md.) 114.

[3] Cusack *v.* White, 1 Rep. Const. Ct. (S. C.) 282.

[4] Williams *v.* The East India Co., 3 East, 192.

[5] Story on Bailments 152, 153; Schmidt *v.* Blood, 9 Wend. (N. Y.) 268, 271.

[6] Cutter *v.* Moore, 7 N. J. Eq. 219. And see Co. Litt. 78, b.

[7] Lee *v.* Cook, 1 Wash. (U. S. C. C.) 306; Munroe *v.* Gardner, 1 Rep. Const. Ct. (S. C.) 308. *Et in facto quod se habet ad bonum et malum, magis de bono quam de malo præsumendum est.* Co. Litt. 75, b.

[8] Bennett *v.* Clough, 1 B. & Ald. 461.

[9] Sissons *v.* Dixon, 8 Dow. & Ry. 526; 5 B. & C. 758.

[10] Rex *v.* Inhabitants of Twyning, 2 B. & Ald. 386.

sumption that it is licensed pursuant to the statute;[1] and a corporation, in receiving a contract for debt, will be presumed to have acted within its powers.[2]

Upon the same ground we are to presume that an unexplained interlineation, erasure, obliteration or other alteration of a written instrument was made before its execution. Such would, of course, be the presumption on a criminal prosecution for forgery; and the range of decisions in civil cases, with a few exceptions, follows the same rule.[3]

Exceptions to this doctrine are found in the case of bills of exchange, promissory notes and the like commercial paper. Thus, on a question arising whether the date of an acceptance was altered (the alteration appearing on its face) before or after the bill was indorsed, the indorsement being unavailable if made before the alteration, ABBOTT, CH. J., refused to presume in favor of an alteration at the proper time, observing that the plaintiff must prove the alteration to have preceded the acceptance, otherwise it would be void for want of a new stamp.[4] Here, it will be perceived, was a complete departure from the usual presumption in favor of innocence; for the judge intends a forgery. If the case went on a general inclination observed among men to evade the burden imposed by the stamp laws, it is obvious that the

[1] Rodwell *v.* Redge, 1 C. & P. 220.

[2] New York Firemen's Ins. Co. *v.* Sturges, 2 Cow. (N. Y.) 664.

[3] In Fitzgerald *v.* Ld. Fauconberge, Fitz-G. 207, the interlineation was in a deed of conveyance or settlement of F.'s estate, and tended to enlarge the power of revocation over his estate, which he had received to himself; and LORD CHIEF BARON REYNOLDS (with whom the master of the Rolls and Lord Chancellor seem to have concurred) said he must look upon it as if it had been originally incorporated in the body of the deed, "for there was no proof when these words were interlined." Fitz-G. 214. The Lord Chancellor speaks of it at page 223. In Trowel *v.* Castle, 1 Keb. 22, it was given in charge to the jury that "an interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, and not after." So, in Wickes *v.* Caulk, 5 H. & J. (Md.) 41, on objection that the subscribing witnesses' names were erased, the court declared that "it is incumbent on a party who wishes to avoid a deed by its erasure to prove that the alteration was made after its execution and delivery." See note 433, vol. 2.

[4] Johnson *v.* Duke of Marlborough, 2 Stark. 313.

onus would be changed in respect to various other species of paper, as well as the commercial kind. So, in a subsequent case, where the action was by the indorsee against the acceptor of a bill of exchange, an alteration appearing to have been made in the sum, it was held at bar to lie with the plaintiff to prove that it was properly made.[1]

Another exception has been made in case of an appeal bond, though the court do not deny the general presumption in favor of an alteration before execution. They say the presumption may be rebutted; and they will not put the appellee to that hazard.[2] In the latter case, it is said, a note of the alteration by the attesting witness would have obviated the objection, and that this might have been subjoined by the witnesses on the motion to dismiss the appeal; and it is agreed by all the cases, that where the alteration appears to be suspicious on its face, and is not duly noted, as if the paper have been cut close, or a mutilated figure be left, or the ink differ, or the handwriting be that of a holder interested in the alteration, etc., the onus lies with the party who claims that the alteration was genuine.[3]

So if the suspicion arises from extraneous circumstances.[4] And the instrument may, in turn, be sustained by internal evidence of fairness, or external evidence applicable to the transaction.[5]

Nor is it to be disguised that an unpleasant appearance of contrariety exists among the cases as to the general rule, where no suspicion arises independent of the alteration itself, while various high authorities follow the ancient rule of presumption in favor of an alteration *before* execution.[6]

[1] Henman *v.* Dickinson, 5 Bing 183. But see Cumberland Bank *v.* Hall, 215. And see Sayre *v.* Reynolds, 737; Rankin *v.* Blackwell, 2 John. Cas. (N. Y.) 198, 200.

[2] Sutphen *v.* Hardenberg, 9 N. J. Eq. 288; Shinn *v.* White, 10 N. J. Eq. 187.

[3] Bishop *v.* Chambre, 3 C. & P. 55; Nunnery *v.* Cotton, 1 Hawks (N. C.), 222; Jackson *ex dem.* Gibbs *v.* Osborn, 2 Wend. (N. Y.) 555; Collier *v.* Jacoby, 9 Cow. 125, 126; M'Micken *v.* Beauchamp, 2 Miller (La.), 290.

[4] Campbell *v.* Roe, 2 Hawks (N. C.), 93.

[5] Glanville *v.* Paine, Barnardist. Ch. Rep. 18. And see Cumberland Bank *v.* Hall, 5 N. J. Eq. 215; Rankin *v.* Blackwell, 2 John. Cas. (N. Y.) 198.

[6] 12 Vin. Abr. 57, Evidence Q, a. 2, pl. 5; 13 id. 41, Faits u, pl. 11;

Where a deed or assignment is offered in evidence as a link in a chain of title, it is admissible, notwithstanding an alteration by erasure and interlineation apparent on the face

2 Wood's Inst. (10th ed.) 286, ch. 3; 1 Swift's Syst. 310; 4 Cruis. Dig. 495, tit. 32, ch. 26, § 10; Rankin *v.* Blackwell, 2 John Cas. (N. Y.) 198; Cumberland Bank *v.* Hall, 5 N. J. Eq. 215; Stark. Ev. pt. 4, p. 476, note *h*; Prevost *v.* Gratz, 6 Wheat. (U. S.) 481, 502. Other cases, or at least other dicta of very able judges, are diametrically opposed. In Gibbs *v.* Osborn, 2 Wend. (N. Y.) 555, although that case is sustainable on the ground of a strong suspicion, independent of the mere erasure, yet the reasoning of the court, who speak by SUTHERLAND, J., is general, and would seem to change the onus in all cases. The authorities cited by him apparently relate to one case only, viz.: that of an altered deed, the execution of which is claimed to be proved by its age and possession under it. In such a case age and possession are not sufficient, but the ordinary proof must be resorted to. Mr. Phillipps, vol. 1, p. 405, ed. of 1823, cited by the learned judge, also would seem applicable to cases of alteration generally. The dictum of WASHINGTON, J., in the case of Prevost *v.* Gratz, in note *b* to the above page of Phillipps, reported in 1 Pet. (U. S. C. C.) 364, 369, is to the same effect with the doctrine of SUTHERLAND, J.; and both are sustained by the Nisi Prius decision, and charge to the jury of MCKEAN, C. J. Morris' Lessee *v.* Vanderen, 1 Dal. (U. S.) 64, 67. The force of MR. JUSTICE WASHINGTON'S decision and dictum, in Prevost *v.* Gratz, was taken away by a review and reversal of his decree, in the Supreme Court of the United States (S. C., 6 Wheat. 481, 502), by which the authority of that high tribunal is turned in favor of the ancient rule. DUNCAN, J., speaking of that case, in Heffelfinger *v.* Shutz, 16 S. & R. (Penn.) 47, calls it a presumption made in favor of innocence, "even where the alteration was in favor of the person in whose handwriting it was." Still, however, if we superadd the decisions of the English courts upon commercial paper, which, although we have set them down as making an exception, are not directly so treated by the judges, the discrepancy may be quite embarrassing. We called those cases exceptions, because they do not profess to overrule or question the ancient cases. It is certainly a point of no little interest, how the rule shall finally stand, which must exercise almost a daily influence on important rights. The dictum of a learned court, proceeding mainly according to the civil law, also sustains the above departures from what was clearly the ancient rule of the common law. We allude to the late case of McMicken *v.* Beauchamp, 2 Miller (La.), 290. There a contract appeared to be altered in a material part by *different ink*. The court disregarded the difference of the ink (which we have seen would have changed the onus under the old common-law rule); and, on quotations from the civil law, as construed by Spanish commentators, take the broad ground, "that writings erased or interlined, are presumed to be false." They add that "the rules in relation to this subject, cited from the Spanish and civil law, are in conformity with the law of merchants, and all systems of jurisprudence with which we have any acquaintance."

of the instrument, in a different ink.[1] This is sometimes placed on the ground that the law presumes an interlineation in a deed to have been made at or before the time of its execution.[2] In some of the States no such presumption is raised.[3] There being no circumstance of suspicion appearing upon the deed, except that which arises from the mere fact of the erasure or interlineation, the court will not presume a forgery of the instrument; but when the alteration of the paper is such as to change its legal effect in favor of the party producing it, the presumption that it was made before execution is not very strong—barely sufficient for its admission in evidence; and in any case where the alteration is material, the time when it was made is a question of fact to be passed upon by the jury, and one that naturally calls for some explanation on the part of the person offering the instrument in evidence.[4] The refusal to produce a deed alleged to contain a clause fraudulently inserted, which did not appear in the mortgage as recorded in the clerk's office, is a badge of fraud from which the jury may pronounce against the claim under that clause.[5] In the case of a will, which bears on its face evidence of having been interlined and added to and altered in a material part, the whole being in the handwriting of the testator, the party producing and claiming under it is bound to explain the suspicious circumstances. Evidence being given on both sides, the question whether the deceased executed that will, is one of fact, unembarrassed by any presumption one way or the other.[6] The act of an officer certifying a judgment and noting erasures, alterations and interlineations, will be presumed to have been made at the time the roll was authenticated, truly and in good faith.[7]

[1] Smith *v.* McGowan, 3 Barb. (N. Y.) 404.

[2] Doe *v.* Catamore, 5 Eng. Law and Eq. 349; Farnsworth *v.* Sharp, 4 Sneed (Tenn.), 55; Stoner *v.* Ellis, 6 Ind. 152; Bailey *v.* Taylor, 11 Conn. 531, 534; Crabtree *v.* Clark, 20 Me. 337.

[3] Ely *v.* Ely, 6 Gray (Mass.), 439; Jordan *v.* Stewart, 23 Penn. St. 244.

[4] Jackson *v.* Osborn, 2 Wend. (N. Y.) 555; Herrick *v.* Malin, 22 Wend. (N. Y.) 388.

[5] Hager *v.* Hager, 38 Barb. (N. Y.) 92.

[6] Van Buren *v.* Cockburn, 14 Barb. (N. Y.) 118.

[7] Lozier *v.* Westcott, 26 N. Y. 149.

In respect to bills and notes, it will not be presumed that an alteration by erasure or by interlineation, apparent on the face of the paper, which tends to diminish the rights of the party to whom it was given, was made *after* the paper was executed:[1] and it has been frequently held, though the authorities are not harmonious, that no such presumption will be raised even where the alteration would enure to the advantage of the payee or holder.[2] Clearly, not where the payee only fills in a blank in the note.[3] The English rule calls for explanation of the alteration of the bill or note from the party producing it.[4] An alteration of a note so as to make the interest payable semi-annually, made by the maker and payee after its delivery, discharges the surety.[5]

But although it is said that fraud, etc., are not to be presumed, the student should be careful to remember that this is predicable of those acts only which stand alone. Not that fraud, like crime, may not be made out and presumed from circumstantial testimony.[6] True, this ought not to be slight.[7] Yet strong presumptive circumstances indicating fraud, will outweigh positive proof against it.[8] Indeed, so common and obvious are these circumstances in some cases, as where property is transferred in fraud of creditors, that the professional reader can find ample illustration in his own recollection. The Court of Chancery constantly presumes fraud from certain confidential relations, as that of trustee and *cestui que trust*, principal and agent, etc., existing between the parties in respect to the subject-matter of the contract;[9] a principle which constitutes an important distinction between the jurisdiction of chancery and the courts of common law.[10]

[1] Bailey *v.* Taylor, 11 Conn. 531.

[2] Agawam Bank *v.* Sears, 4 Gray (Mass.), 95.

[3] Kitchen *v.* Place, 41 Barb. (N. Y.) 465.

[4] Knight *v.* Clements, 8 Ad. & El. 215; Henman *v.* Dickinson, 5 Bing. 183; Clifford *v.* Parker, 2 M. & G. 909.

[5] Dewey *v.* Reed, 40 Barb. (N. Y.) 16.

[6] *Per* Lord Hardwicke, in Aston *v.* Aston, 1 Ves 268; Watkins *v.* Stockett, 6 H. & J. (Md.) 435; Brogden *v.* Walker, 2 id. 292.

[7] Caldwell *v.* Benedict, 8 Mart. (La.) 454.

[8] The Short Staple, 1 Gal. (U. S.) 104.

[9] Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 361.

[10] Cadwell *v.* King, 4 Cow. (N. Y.) 207.

A voluntary conveyance by a debtor to a trustee for the benefit of his wife, is deemed fraudulent and void, as against existing creditors;[1] to render a deed voluntary, it must be without any the least valuable consideration; if given for any the least valuable consideration, the question whether it is fraudulent as to creditors is one of fact for a jury.[2] Even a voluntary conveyance from a parent to his child by way of advancement, though presumed fraudulent as against existing creditors, may be upheld where the presumption is repelled by circumstances or by positive evidence.[3] The intent to defraud need not be shown by direct evidence. A conveyance by the father to his son of all his property, in part consideration of an unliquidated indebtedness to him for several years' labor, and in part to provide for his own and his wife's future support, the son to pay all his debts except a contingent liability by indorsement, the whole consideration being much less than the value of the property conveyed, is fraudulent and void, as against creditors.[4] A sale to an infant partly on credit, made by a firm in embarrassed circumstances, is not necessarily fraudulent and void as against creditors.[5] To avoid a voluntary conveyance, as against creditors, it is not necessary that the debtor should be insolvent, or believe himself to be so, at the time of the grant; it is sufficient if his solvency depends upon his success in business, in a pending speculation.[6] When the conveyance is made by a man in prosperous circumstances, and the gift is only a reasonable provision for his wife or children, which leaves him fully able to discharge all his debts, the presumptive evidence of fraud is met and repelled.[7] The fraud which must be alleged and proved, may be established by facts and circumstances;[8] if not inferable from the circumstances, the

[1] Read *v.* Livingston, 3 Johns. Ch. (N. Y.) 481.

[2] Jackson *v.* Seward, 5 Cow. (N. Y.) 67.

[3] Van Wyck *v.* Seward, 18 Wend. (N. Y.) 375.

[4] Robinson *v.* Stewart, 10 N. Y. 189.

[5] Matthews *v.* Rice, 31 N. Y. 457.

[6] Carpenter *v.* Roe, 10 N. Y. 227.

[7] Babcock *v.* Eckler, 24 N. Y. 623; Hinds' Lessees *v.* Longworth, 11 Wheat. (U. S.) 199.

[8] Newman *v.* Cordell, 24 N. Y. 623; Waterbury *v.* Sturtevant, 18 Wend. (N. Y.) 353.

conveyance will not be invalidated by a subsequent inability to pay an existing debt.[1]

In an action for damages for inducing the plaintiffs to sell and deliver goods by false and fraudulent representations, it seems that the plaintiff will not be allowed to testify in answer to a question by his own counsel, that he sold and delivered the goods relying on the truth of the defendant's representations;[2] his intention and motives are in issue and so are the representations themselves; his acts must declare his intent, as in the case of a voter depositing a written ballot.[3]

So a conspiracy may be proved by circumstances, among which are the acts of the parties in doing the injury which is the alleged object of the conspiracy.[4]

Again: men are presumed to act according to their own interest.[5] A tenant in tail pays off an incumbrance on the estate. Why? In order to exonerate it; for he can at any time obtain the fee simple in another form, and therefore has no interest in keeping it on foot to protect the estate, or enlarge it, or to reimburse himself. Otherwise of a tenant for life, who has but a temporary interest. He cannot save himself without the incumbrancer's place, which chancery will give to him, with all the incumbrancer's rights and remedies, upon the presumption that the tenant intended the apparent payment as an act of purchase. And so of the like cases.[6]

This presumption, like any other, may in various ways be repelled.[7]

[1] Newman *v.* Cordell, 24 N. Y. 623.

[2] Shaw *v.* Stine, 8 Bosw. (N. Y.) 157.

[3] People *v.* Saxton, 22 N. Y. 309.

[4] Jones *v.* Becker, 7 Cow. (N. Y.) 445.

[5] Finch's Law, 37.

[6] *Per* Lord Thurlow, C., in Countess of Shrewsbury *v.* Earl of Shrewsbury, 1 Ves. Jr. 227, 233; Kirkham *v.* Smith, 1 Ves. 258; Amesbury *v.* Brown, 1 Ves. 477; Jones *v.* Morgan, 1 Bro. C. C. 206, 218; Ware *v.* Polhill, 11 Ves. 257; St. Paul *v.* Lord Dudley, 15 Ves. 167; Redington *v.* Redington, 1 B. & B. 131, 141; Earl of Buckinghamshire *v.* Hobart, 3 Swanst. 186.

[7] *Per* Lord Eldon, C., in St. Paul *v.* Viscount Dudley, 15 Ves. 173; Jones *v.* Morgan, 1 Bro. C. C. 206; Lady Shrewsbury *v.* Lord Shrewsbury, 3 Bro. C. C. 126; Redington *v.* Redington, 1 B. & B. 143; Windham *v.* Lord Egremont, Ambl. 753; Kirkham *v.* Smith, 1 Ves. 258; Amesbury *v.* Brown, 1 Ves. 480; Earl of Buckinghamshire *v.* Hobart, 3 Swanst. 186; Forbes *v.* Moffat, 18 Ves. 384. And see Gardner *v.* Astor, 3 John. Ch. (N. Y.) 53, 55.

The modern cases have arisen mainly upon mortgage transactions. Thus, where the equity of redemption was devised to the mortgagee, it was held that this union of estates should extinguish the mortgage, if that result would be indifferent to the devisee; otherwise if he had an interest to keep it on foot; and so of other similar cases.[1] *Prima facie*, it is an extinguishment; and the one who pays must show that his interest was to have the mortgage kept on foot.[2] Thus, where one owning the equity of redemption in fee, paid off a mortgage in which the mortgagor's wife joined, and which payment, if allowed to operate as an extinguishment, would let in her dower against the owner, discharged from the mortgage, the latter will be taken as still subsisting.[3] And this would be so, although the owner not only pays, but takes a release from the mortgagee.[4] So where the mortgagee took a deed with warranty from the mortgagor, the former was still allowed the benefit of his mortgage, as against a previous attaching creditor of the mortgagor.[5] So of the covenants of title, in the mortgage.[6] And though he takes a release of the equity of redemption on his prior mortgage, and discharges the debt, this will not let in a subsequent mortgage.[7] But in such a case, the proof of an interest or intent at the time to keep the mortgage on foot, should be clear and precise.[8] Where the intention is declared by the deed to consider the mortgage paid, this will be conclusive.[9] Whether considerations of interest prevail or not, all the cases agree that the intent may be declared at the time, or deduced from various circumstances.[10]

[1] Forbes *v.* Moffat, 18 Ves. 384; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Freeman *v.* Paul, 3 Me. 260; Starr *v.* Ellis, 6 John. Ch. (N. Y.) 393; Mills *v.* Comstock, 5 id. 214; Lockwood *v.* Sturdevant, 6 Conn. 372.

[2] Gardner *v.* Astor, 3 John. Ch. (N. Y.) 53; Burnet *v.* Deniston, 5 id. 35; Starr *v.* Ellis, 6 id. 393.

[3] Gibson *v.* Crehore, 3 Pick. (Mass.) 475.

[4] Caril *v.* Butman, 7 Me. 102; Thompson *v.* Chandler, id. 377.

[5] Myers *v.* Brownell, D. Chip. (Vt.) 488.

[6] Lockwood *v.* Sturdevant, 6 Conn. 373.

[7] Baldwin *v.* Norton, 2 Conn. 161.

[8] Burnet *v.* Denniston, 5 John. Ch. (N. Y.) 35.

[9] Wade *v.* Howard, 6 Pick. (Mass.) 492.

[10] James *v.* Johnson, 6 John. Ch. (N. Y.) 417.

Upon the same principle, long acquiescence by one in the adverse enjoyment of a right by another, leads to an inference that the former has parted with it in a legal form; and, in time, may lead to the presumption of the necessary instruments of assurance, or of the requisites to make existing assurances valid against him. So of the extinction and satisfaction of demands, and the sanctioning of secondary evidence.[1]

Upon the same principle, it is presumed that a man has adopted or accepted an advantageous act, offer, gift, bequest, devise or conveyance, etc., until his positive disclaimer or refusal is shown.[2] This rule is mainly applied to the presumed acceptance by creditors of their debtor's assignment, in trust for their payment, where the assignment requires no release or other disadvantageous terms.[3] But the doctrine of presumed assent in these particular cases is received, if at all, with great caution in Massachusetts, where, to warrant it, the benefit must appear to be decided and unequivocal.[4] The Supreme Court of that State, however, applied the principle very strongly in another case, where they presumed the assent of a widow to a testamentary provision in lieu of dower, it appearing decidedly advantageous.[5] In England, it is held that one shall be presumed to have adopted an advantageous act done by another as his assumed agent.[6]

[1] Fitzhugh *v.* Croghan, 2 J. J. Mar. (Ky.) 435 to 437, and Bigger *v.* Alderson, 1 Munf. (Va.) 54.

[2] *Per* BAYLEY and LITTLEDALE, J's, in Bailey *v.* Culverwell, 8 B. & C. 448; Marston *v.* Butler, 3 Wend. (N. Y.) 149; Camp *v.* Camp, 5 Conn. 291; Townsend *v.* Tickell, 3 B. & Ald. 31, and the cases there cited, particularly Thompson *v.* Leach, 2 Salk. 618. See also Nicholson *v.* Wordsworth, 2 Swanst. 365, 372; Adams *v.* Taunton, 5 Madd. 435; and 2 Prest. on Abstracts, 226 *et seq.*

[3] Nicholl *v.* Mumford, 4 John. Ch. (N. Y.) 522, 529; Halsey *v.* Fairbanks, 4 Mas. (U. S.) 206. And see Brooks *v.* Marbury, 11 Wheat. (U. S.) 78; and M'Allister *v.* Marshall, 6 Binn. (Penn.) 338. Or to the assent of the assignees or trustees. Wilt *v.* Franklin, 1 Binn. (Penn.) 502. And see Lippincott *v.* Barker, 2 Binn. (Penn.) 174; Shepherd *v.* M'Evers, 4 John. Ch. Rep. 136; Nelson *v.* Blight, 1 John. Cas. 205; Weston *v.* Barker, 12 John. (N. Y.) 276; and Cumberland *v.* Codrington, 3 John. Ch. (N. Y.) 229, 261.

[4] Russell *v.* Woodward, 10 Pick. (Mass.) 408.

[5] Merril *v.* Emery, 10 Pick. (Mass.) 507.

[6] *Per* BAYLEY and LITTLEDALE, JJ's, in Bailey *v.* Culverwell, 8 B. & C. 448. In Beal *v.* Taylor, 5 Hill (N.

Other presumptions arise from the nature and general incidents of property. To the ownership of lands, certain rights and privileges are annexed *de communi jure;* though not so inseparable but that they may be disannexed, and vested in another. Thus the lord of the manor owns the soil of common right; and on his being proved lord of the manor, his ownership of the soil is intended; and it lies with the opposite side to show that any part belongs to another.[1] So the different landholders of a manor have *prima facie* a right of common on the lord's waste; and the owner of the surface of the land, to the minerals or inferior strata; the possessor of a several fishery to the ground covered with water;[2] and of various other incidental rights, as the lord to the soil of the highway running over the waste of his manor;[3] and the owner of inclosed land, to the waste intervening between that and the highway.[4] So where a road passes between the land of A. and B., *prima facie*, each owns the soil thereof, *usque ad filem viæ.*[5] So two proprietors on opposite sides of a river not navigable, that is to say, above the ebb and flow of the tide, own *usque filum aquæ;* and the proprietor of both sides owns the whole.[6]

Y.), 587, where a debtor residing in Baltimore, in failing circumstances, sent goods to Taylor & Co., at New York, to be delivered to plaintiff in part payment of a debt due to him, at the same time sending to plaintiff a letter apprising him of the fact, and the goods were received by Taylor & Co., and sold within a few days, it was held that plaintiff might recover the value of the goods so sent to him; that the arrangement being beneficial to the plaintiff, his assent might be presumed, on the principle that a trust created for the benefit of a third person, though without his knowledge, may be subsequently adopted and enforced by him. The acceptance of a deed delivered to a stranger for the use of a grantee, will be presumed. Church *v.* Gilman, 15 Wend. (N. Y.) 656. The question of acceptance is one of fact. Sturtevant *v.* Orser, 24 N. Y. 538.

[1] Co. Litt. 261 a, note 1, in Harg. & Butl. ed.

[2] Co. Litt. 122 a, note 7, Harg. & Butl. ed.; Lofft, 364, title, Separate Fishery; Partheriche *v.* Mason, 2 Chitt. 658.

[3] Lofft, 358; 1 Roll. Abr. 392, 1, 5.

[4] Pring *v.* Pearcy, 7 B. & C. 304.

[5] Lofft, 359; *per* GIBBS, CH. J., in Grose *v.* West, 7 Taunt. 41; Watrous *v.* Southworth, 5 Conn. 305; Cook *v.* Green, 11 Price, 736.

[6] *Ex parte* Jennings, 6 Cow. (N. Y.) 518; 2 Dane's Abr. 692, § 13; Waters *v.* Lilly, 4 Pick. (Mass.) 145; Commonwealth *v.* Chapin, 5 Pick. (Mass.) 199; Mason *v.* Hill, 3 B. & Ad. 76; Fleming *v.* Kenney, 4 J. J. Mar. (Ky.) 158; and Scott *v.* Wilson, 3 N. H. 321.

As before remarked, these incidental or presumptive rights are not inseparable. The presumption may, therefore, be rebutted.[1] Thus the presumption that the right of minerals accompanies the fee, may be rebutted by showing a user by others.[2]

Other presumptions are founded on the dictates of prudence and discretion; as that regular and ordinary means are adopted for a given end. Hence, where the means calculated to attain a certain end appear to have been adopted, or the end itself appears to have been attained, a technical and particular completion in the one case, or all the ordinary previous steps in the other, need not be proved, but will be presumed; especially if the absence of particular proof is accounted for. Thus proof of sealing and delivery without the signing of a deed, the usual place on the deed for this being mutilated, would doubtless warrant the presumption that the deed was signed. So if the deed is lost. So where the attestation says only "sealed and delivered," in a case where you are put to proof of the subscribing witness's handwriting; or where there is no attesting witness; but you prove the parties' hand to a paper sealed, with the usual attestation, "sealed and delivered," the paper being in your hands and for your benefit; or in the ordinary case of establishing a contract by simply proving the signature to be in the handwriting of the party to be charged. In all these cases something is wanting in the direct proof; the handwriting in one case, the sealing in another, the delivery in another, yet the facts which are proved lead irresistibly to the presumption that the other acts requisite to give validity to the instrument were, in truth, done, and the law applies the maxim, *Omnia præsumuntur recte solleniter esse acta, donec probetur in contrarium.*[3] This is a maxim of extensive application in the law of presumptive evidence; and where direct proof is beyond the party's reach, or in cases where it

[1] 1 Roll. Abr. 401; 16 Ves. 390; Co. Litt. 122 a, note of Harg. & Butl.; Lade *v.* Shepherd, 2 Str. 1004; Grose *v.* West, 7 Taunt. 39.

[2] Rowe *v.* Grenfel, Ry. & M. 396.

[3] See 12 Wheat. 70.

is not reasonably to be expected, comes in aid of numerous defects.[1]

Where the bargain and sale for a year, and the release bear date the same day, the former will be presumed to have been first executed, this course having been necessary to give them validity as a conveyance. And so of any other and like modes of conveyance.[2] So where a witness attested only the last sheet of a will, all the sheets were presumed to have been in the room.[3] Or if all the witnesses are dead, a regular execution is intended from proof of their handwriting.[4] So a deed will be presumed to have been delivered on the day of its date.[5] And having a seal at the trial, will be presumed to have had one when delivered, although the subscribing witness remembers no seal. A patent from the State will be presumed to have borne the great seal, although the exemplification is marked "L. S." only.[7] And after a few years' possession and exercise of corporate rights by an ecclesiastical corporation, formed under the New York statute, it will be presumed that the proper officer was present at the formation, although the certificate of the proceedings omits to mention that circumstance.[8] So a judicial confirmation of a sale made under a decree, by a trustee, was presumed.[9] A contract by A. to work for B., and another bearing the same date, and having the same subscribing witness, by which B. promised to pay A. a certain sum in a certain way, were intended the one to form the consideration of the other.[10]

[1] M'Queen *v.* Farquhar, 11 Ves. 467; Burrowes *v.* Lock, 10 Ves. 470; Pigot *v.* Holloway, 1 Binn. (Penn.) 436; Rex *v.* Catesby, 2 B. & C. 814; Gaston *v.* Mason, 1 N. J. Eq. 10; Curtis *v.* Hall, 4 N. J. L. 148; Newbold *v.* Lamb, 5 N. J. L. 449; Churchill *v.* Speight, 2 Hayw. (N. C.) 338; Rex *v.* Witchurch, 7 B. & C. 573.

[2] Barker *v.* Keate, 1 Freem. 251; Atkyns *v.* Horde, 1 Burr. 106.

[3] Bond *v.* Seawell, 3 Burr. 1773.

[4] Hands *v.* James, 4 Conn. 531; Brice *v.* Smith, Willes, 1; Croft *v.* Pawlet, 2 Str. 1109.

[5] Breckenridges *v.* Todd, 3 Monroe, 54, 55; Shep. Touch. 72.

[6] Ball *v.* Taylor, 1 C. & P. 417.

[7] Williams *v.* Sheldon, 10 Wend. (N. Y.) 654.

[8] All Saints' Church *v.* Lovett, 1 Hall (N. Y.), 191.

[9] Shilknecht *v.* Eastburn's Heirs, 2 G. & J. (Md.) 114.

[10] Aldridge *v.* Birney, 7 Monr. (Ky.) 344, 347.

It has been a matter of much litigation, how far the maxim, *Omnia præsumuntur rite esse acta*, shall prevail in establishing the jurisdiction of a court or magistrate. In England it is not admissible as to the *facts* which constitute a special and limited jurisdiction,[1] although it is otherwise of courts having general jurisdiction. In the former case, in order that the party may avail himself of the proceeding, he must not only plead, but prove the facts which go to the question of jurisdiction.[2] But in Massachusetts, there appearing on the files of the Probate Court a record of assignment of dower regular on its face, the Supreme Court intended that a regular application by the widow was made, or her assent given for that purpose.[3] And in Pennsylvania the maxim was expressly applied to support the summary proof of a will in a County Court of Virginia; the court saying, "To the act of the County Court in holding jurisdiction of the subject of probate, the maxim, *Omnia*, etc., is as applicable as the judicial proceedings of our own State."[4] In New York, as to these foreign proceedings, which are unknown to the common law, the cases appear to conflict. In one, which was the case of a New Jersey attachment of a vessel by a material-man, it was sustained on the presumption that the law of that State warranted the proceeding.[5] But in another case, which related to a specific delivery of real estate under an execution, in satisfaction of a judgment of Vermont; a very common proceeding in New England, it was placed upon the ground of a strictly foreign proceeding unknown to the common law, jurisdiction of which must be shown by pleading the local statute and proving it.[6] But by this and several other cases, it is agreed that upon a common-law question that law shall be presumed to prevail in a neighbor-

[1] *Per* HOLROYD, J., in Rex *v.* All Saints, 1 M. & Ry. 668.

[2] Rudd *v.* Johnson, 5 Litt. (Ky.) 19; also stated *supra*, pl. 9, of this note.

[3] Tilson *v.* Thompson, 10 Pick. (Mass.) 359, 363.

[4] Ripple *v.* Ripple, 1 Rawle (Penn.), 386.

[5] The Stamford Steamboat Co. *v.* Gibbons, 9 Wend. (N. Y.) 327.

[6] Holmes *v.* Broughton, 10 Wend. (N. Y.) 75.

ing State until the contrary be shown.[1] This subject, however, belongs more properly to the future head which treats of the mode of proving domestic and foreign judgments and other judicial proceedings. It will be presumed that a commission has been returned by mail as required by statute and opened by the justice issuing it;[2] that arbitrators have acted within the time set for their award,[3] on all the matters submitted;[4] that the three assessors have acted together, though only two of them have signed the report;[5] that the three commissioners of highways were present in the laying out of a private road;[6] that an act shown to have been done was done at the right time.[7] But the law will not presume a fact requisite to confer jurisdiction in a special proceeding;[8] though there is a presumption in favor of the regularity of the proceedings of a board of officers;[9] and in favor of the jurisdiction of the surrogate over the estate of a decedent, after a lapse of many years.[10]

Other presumptions are referable to the policy of the law. An instance under this head is the presumption in favor of cross remainders when the land is devised between two persons as tenants in common in tail, and the contrary when between more than two.[11] This rule is of course confined to devisees, and is subject to various modifications and exceptions arising from the particular language of the will.[12]

[1] Walker *v.* Maxwell, 1 Mass. 103; Legg *v.* Legg, 8 Mass. 99.

[2] Hall *v.* Barton, 25 Barb. (N. Y.) 274.

[3] Owen *v.* Boerum, 23 id. 187.

[4] Ott *v.* Schroeppel, 6 N. Y. 482.

[5] Doughty *v.* Hope, 3 Den. (N. Y.) 249, 594; 1 N. Y. 79.

[6] Tucker *v.* Rankin, 15 Barb. (N. Y.) 471.

[7] Sheldon *v.* Wright, 7 Barb. (N. Y.) 39.

[8] People *v.* City of Brooklyn, 21 Barb. (N. Y.) 484.

[9] People *v.* Carpenter, 24 N. Y. 86.

[10] Bolton *v.* Brewster, 32 Barb. (N. Y.) 389.

[11] 2 Bl. Com. 381.

[12] See Perry *v.* White, Cowp. 777; Phipard *v.* Mansfield, Cowp. 797, 800; Burden *v.* Burville, 2 East, 47, 48, note; Holmes *v.* Meynel, T. Jones, 172; Atherton *v.* Pye, 4 T. R. 710; Cooper *v.* Jones, 3 B. & Ald. 425, 429; Staunton *v.* Peck, 2 Cox C. C. 8; Watson *v.* Foxton, 2 East, 36, 40; Roe *v.* Clayton, 6 East, 628; Gorges *v.* Webb, 1 Taunt. 234; Green *v.* Stephens, 17 Ves. 64; Comber *v.* Hill, 2 Str. 969; Davenport *v.* Oldis, 1 Atk. 579; Dyer *v.* Dyer, 19 Ves. 612; Jones *v.* Randall, 1 J. & W. 100.

Again: the presumption is, that money borrowed by the husband, on the security of the wife's real estate, is appropriated solely by him, the money being under his absolute control, in virtue of the power conferred by the marital right.[1] Hence, she and her personal representative have a right in equity to demand of him and his representatives, that his estate shall be first applied in discharge of the incumbrance, so as to relieve her estate.[2] This, however, being but an equity, may be rebutted by another equity, which may be set up by parol proof.[3] As if the money was raised to pay off her debts due *dum sola*;[4] or for her private use;[5] even though she should afterwards make a present of the money to him.[6] And so, in general, where the money is raised partly for the use of each.[7] Where the wife purchases a chattel on her personal credit, and the husband takes it into his possession and uses it, the title is held to vest in him.[8]

In some cases, the mere want of presumption on the one side is a sufficient presumption in favor of the other; for wherever the nature of a subject leaves it perfectly indifferent whether a given fact does or does not exist, the party who founds his claim or his defense upon the existence of it, must remove that indifference; and the opposite party may rely upon the single argument that nothing appears in opposition to him; and that *de non apparentibus et non existentibus eadem est ratio*.[9]

Where the existence of one fact so necessarily and absolutely induces the supposition of another, that if the

[1] Earl of Kinnoul *v.* Money, 3 Swanst. 208, note.

[2] Neimcewicz *v.* Gahn, 3 Paige (N. Y.), 614; Tate *v.* Austin, 1 P. Wms. 264; Lord Huntingdon's Case, 2 Vern. 437; Astley *v.* Earl Tankerville, 3 Bro. C. C. 545; Earl of Kinnoul *v.* Money, 3 Swanst. 208, note *a*. And see Pocoke *v.* Lee, 2 Vern. 604; and Clinton *v.* Hooper, 1 Ves. Jr. 173.

[3] *Per* Lord Hardwicke, in Earl of Kinnoul *v.* Money, 3 Swanst. 202, 208, note *a*.

[4] Lewis *v.* Nangle, Ambl. 150; Earl of Kinnoul *v.* Money, 3 Swanst. 202, note; Bagot *v.* Oughton, 1 P. Wms. 347.

[5] Clinton *v.* Hooper, 1 Ves. Jr. 188.

[6] Clinton *v.* Hooper, 1 Ves. Jr. 188.

[7] Lewis *v.* Nangle, Ambl. 150.

[8] Glann *v.* Younglove, 27 Barb. (N. Y.) 480.

[9] 2 Ev. Poth. 329, No. 16, § 14.

one is true the other cannot be false, as where *connection* is inferred from *pregnancy*, the term presumption cannot be legitimately applied ; for the nature of presumption is, that it does not require to be substantiated, but that it may be defeated by positive contradiction, according to the maxim, *Stabitur presumptioni donec probetur in contrarium.*[1] The distinction between presumption and proof is, that the one may be false, but until shown to be so, must be regarded as true ; that the other (the facts upon which it is founded being admitted) cannot be otherwise than true.[2]

[1] Lofft's Gilb. 303.

[2] 2 Ev. Poth. 329, No. 16, § 14.

CHAPTER IV.

HEARSAY EVIDENCE.

SECTION.

83. General Rule.
84. What is Hearsay.
85. Exceptions to the Rule.

Sec. 83. General Rule.

It is a universal general rule that *mere hearsay evidence is not admissible to establish any specific fact which, in its nature, is capable of being proved by witnesses who speak from their own knowledge;*[1] or, in other words, that evidence, whether written or spoken, which does not derive its credibility solely from the credit due to the witness himself, but rests in part upon the veracity and competency of some other person, from whom the witness received the information, is not admissible to establish a substantive fact. And this is the rule, *although the declaration sought to be proved was, at the time when it was made, against the interest of the person making it,*[2] *and although no other evidence can possibly be obtained,*[3] *as, where it is the declaration of a person who was the only eye witness to the transaction and who is dead,*[4]

[1] Page *v.* Parker, 40 N. H. 47; Scales *v.* Desha, 16 Ala. 308; Chapin *v.* Taft, 18 Pick. (Mass.) 379; Buckley *v.* Cunningham, 34 Ala. 69; People *v.* McCrea, 32 Cal. 98; Penniman *v.* Patchin, 6 Vt. 325. The rule is of modern origin, and the earliest case in which it was acted upon is Sampson *v.* Yardley, 2 Keb. 223. The leading case in this country is Mima Queen *v.* Hepburn, 7 Cranch (U. S.), 290, confirmed in Davis *v.* Wood, 1 Wheat. (U. S.) 6, and although at one time opposed in some of the States, is now universally followed in all of them.

[2] Gordon *v.* Bowers, 16 Penn. St. 226; Fitch *v.* Chapman, 10 Conn. 8; Bailey *v.* Wood, 24 Ga. 164; Macon, &c., R. R. Co. *v.* Davis, 27 id. 113; Coble *v.* McDaniel, 33 Mo. 363; Wiswall *v.* Kenevais, 18 Ala. 65.

[3] Mima Queen *v.* Hepburn, 7 Cranch (U. S.), 296; Ferry *v.* Frystone, 2 East, 54.

[4] 1 Phillips Ev. 214 (Am. ed.). In Harper *v.* Scott, 12 Ga. 125, the declaration of a deceased person as to the loss of a paper was held inadmissible to establish a ground for letting in secondary evidence of its

or of a witness who keeps out of the way to avoid being subpœnaed on the trial.[1] The fact that the statement was sworn to in an affidavit, or upon a trial in another cause, or that it has been made the subject of an entry in an account or other book,[2] or even though it has been repeated by one of the parties, does not strip it of its character as hearsay or render it admissible.[3]

The reason for this rule is, that such evidence requires credit to be given to the statements of a person who is not under the obligations of an oath or any of the ordinary tests for ascertaining the truth of the statement, being subject neither to cross-examination by the party to be affected by his testimony, nor present in court so that his deportment can be observed, nor so situated in reference to the case, that his character or motives can be investigated.[4] Another very forcible reason for the rule is, that such evidence can be fabricated with comparative safety to the witness, as he cannot ordinarily be convicted of perjury, as the testimony of two witnesses, or at least full proof of the falsity of his statement, is necessary. So, too, there is great danger, however honest or conscientious the witness may be, that the statement made by such person may have been imperfectly heard or understood, or inaccurately remembered; therefore it would seem that the rule is founded upon correct principles,

contents; and in Smothers *v.* Mudd, 9 B. Mon. (Ky.) 490, it was held that neither a person's death or absence from the State could be proved by general reputation or hearsay. See also State Bank *v.* Seawell, 18 Ala. 616. But in some of the cases it is held that the *death* of a person may be proved by hearsay, Jackson *v.* Boneham, 15 John. (N. Y.) 226, but that neither the *time, place nor manner* of his death can be shown by that species of evidence, Jackson *v.* Etz, 5 Cow. (N. Y.) 314; nor can the presumption of death arising from an absence of seven years be rebutted by such evidence. Smothers *v.* Mudd, *ante*. The fact that the declaration was made by a person since deceased does not render it admissible. Dewey *v.* Goodenough, 56 Barb. (N. Y.) 54; Gray *v.* Goodrich, 7 John. (N. Y.) 95; Spatz *v.* Lyons, 55 Barb. (N. Y.) 476.

[1] Woodward *v.* Paine, 15 John. (N. Y.) 493.

[2] Churchman *v.* Lewis, 34 N. Y. 444; Miller *v.* Clark, 5 Lans. (N. Y.) 338; Patterson *v.* Maryland Ins. Co., 3 H. & J. (Md.) 71.

[3] Stephens *v.* Vrooman, 16 N. Y. 381.

[4] Gray *v.* Goodrich, 7 John. (N. Y.) 96; Sparge *v.* Brown, 9 B. & C. 938; Sutton *v.* Ridgway, 4 B. & Ald. 55.

and is sound in policy. As we shall see hereafter, this rule is subject to many exceptions, and it is sometimes quite difficult to determine whether a given case comes within the rule or the exception.

Sec. 84. What is Hearsay.

¶ *Whenever a witness states that of which he is not personally cognizant, but has derived from some third person,* his testimony is clearly hearsay, and, except in the special instances which will be hereafter referred to, is not admissible. Thus, upon an issue as to whether a person was pecuniarily responsible at a certain time, it is, as held by most of our courts, not competent for a witness to state what his "understanding" in reference to the matter, as acquired from other persons, is; but he must also speak from his personal knowledge.[1] But it is no departure from the rules of evidence to prove the notoriety in the neighborhood of a fact already proved to exist, to lay the foundation for an inference that the defendants were cognizant of the fact. Thus, where the defendants represented to the plaintiff that an insolvent person was good for his contract, hearsay was held admissible to prove the notoriety of the insolvency in the neighborhood, and establish a presumption that the defendants knew it when they represented him otherwise.[2] So where it is

[1] Caswell *v.* Howard, 16 Pick. (Mass.) 567; Green *v.* Caulk, 16 Md. 556. While the fact of insolvency cannot be proved—as a rule—by hearsay evidence, Molyneaux *v.* Collier, 13 Ga. 406; Walker *v.* Forbes, 25 Ala. 139; Vaughan *v.* Warnell, 28 Tex. 119, in most of the States, yet in some of them it is held that a person's pecuniary responsibility may be shown by his general reputation in that respect *at the time in question*, Bank of Middleburg *v.* Rutland, 33 Vt. 414; and in Michigan it has been held that, in the case of an assignment for the benefit of creditors, evidence of general reputation is admissible to show the pecuniary standing and condition of the assignee, and even his actual insolvency, to establish fraud. Angel *v.* Rosenbury, 12 Mich. 241. See also Miminger *v.* Knox, 8 Minn. 140, where it was held that a person's insolvency might be shown by hearsay. In Vermont the rule is that, when the question at issue is in reference to the pecuniary responsibility of a person, a witness may be allowed to express his opinion as to such person's solvency *as derived from a personal acquaintance with him, and from his reputation in this respect in the community where he resides.* Hand *v.* Brown, 18 Vt. 87.

[2] Ward *v.* Herndon, 5 Port. (Ala.) 382.

sought to bring home to a person knowledge of a certain fact, evidence of the general belief among his neighbors, of the existence of the fact, is admissible.[1] Thus, proof that the burning of a warehouse was generally known in the town where it was situated, is admissible to bring home a knowledge of the fact to one who had cotton destroyed by the fire, who lived within twenty or twenty-five miles of the place, and traded in it, and, two months after the fire, executed his note for an advance on the cotton.[2]

Such evidence is not admissible to establish the *value* of property, although such understanding was derived from persons who buy and sell that species of property,[3] or who are regarded as experts in such matters. Thus, the report of a state fair committee on agriculture upon the value of a patented drill was held mere hearsay and not admissible.[4] An appraisal of property sold under an execution, made by appraisers appointed for that purpose, is not admissible to establish the actual value of the property in question in an action by a person claiming to be its owner ;[5] nor are letters written by the plaintiff to third persons tending to show a conversion of such property by the defendant, admissible to make out a conversion ;[6] nor is it competent for one member of a family to testify as to what another member of the family, who is dead, told him a certain family portrait cost;[7] nor for one member of a firm to testify as to what another member of the firm told him the latter paid for certain goods purchased by him for the firm.[8] General reputa-

[1] Benoist *v.* Darby, 12 Mo. 196.

[2] Jones *v.* Hatchett, 14 Ala. 743. But see Oden *v.* Stubblefield, 4 Ala. 40, where it was held that in order to show that the husband knew certain facts relative to his wife, it was not competent to show that the matter was spoken of in his family in the presence of his wife.

[3] Green *v.* Caulk, 16 Md. 556; Williamson *v.* Dillon, 1 H. & G. (Md.) 444. In Heath *v.* West, 26 N. H. 191, it was held that neither the qualities or value of a horse can be proved by reputation. See also Prescott *v.* Hayes, 43 id. 593, where it was held that proof of rumors which, if true, would affect the value of certain property, is not admissible upon the question of value.

[4] Gatling *v.* Newell, 9 Ind. 572.

[5] Flannigan *v.* Althouse, 56 Iowa, 513.

[6] David *v.* David, 66 Ala. 139.

[7] Houston, &c., R. R. Co. *v.* Burke, 55 Tex. 323.

[8] Williamson *v.* Dillon, *ante.*

tion is not competent evidence to prove a partnership, but the transactions of parties bearing upon the point may be received if not objectionable on general principles;[1] nor is such evidence admissible to establish the fact of agency, and the evidence must go to acts done by the alleged agent and ratified by the principal;[2] nor to prove who are officers of a private corporation.[3]

In an action for the conversion of property against an officer who took it under process as the property of a person in whose possession it was found, it is not competent for the plaintiff, in order to establish his title to the property, to show that such person had stated to others that he borrowed the property of the plaintiff.[4] Neither hearsay evidence or general reputation is admissible to establish the title to property, either personal[5] or real.[6] Thus, where a party offered evidence to show that the land in controversy had been called the land of "I. S.," under whom he claimed, it was held inadmissible.[7] The fact that property was assessed to a certain person, is not admissible in an action in such person's favor to establish his title thereto;[8] nor are letters written by third persons, not parties to the suit, competent evidence.[9]

Sec. 85. Exceptions to the Rule.

To the general rule relating to hearsay evidence, there are, from necessity, several exceptions, which are as well established as the rule itself, and a thorough knowledge of the application of which is of the highest importance to the

[1] Hicks *v.* Crane, 17 Vt. 499; Hersom *v.* Henderson, 23 N. H. 498.

[2] Perkins *v.* Stebbins, 29 Barb. (N. Y.) 523; Blevins *v.* Pope, 7 Ala. 371; Trowbridge *v.* Wheeler, 1 Allen (Mass.), 162.

[3] Litchfield Iron Co. *v.* Bennett, 7 Cow. (N. Y.) 234.

[4] King *v.* Frost, 28 Minn. 417.

[5] Allen *v.* Protee, 40 Ala. 358; Whitsett *v.* Slotee, 23 id. 626; Corley *v.* State, 28 id. 22.

[6] School District *v.* Blakeslee, 13 Conn. 227; McKunion *v.* Bliss, 21 N. Y. 206; Parker *v.* Pierce, 16 Iowa, 227; Howland *v.* Crocker, 7 Allen (Mass.), 153.

[7] School District *v.* Blakeslee, 13 Conn. 227; Urkett *v.* Corgall, 5 W. & S. (Penn.) 60.

[8] Adams *v.* Hiscock, 55 Iowa, 632.

[9] Simpson *v.* Smith, 27 Kan. 565.

practitioner. These exceptions are mainly embraced under the following heads :

1st. Relating to matters of general or public concern.

2d. Pedigree.

3d. Ancient possession.

4th. Boundaries.

5th. Dying declarations.

6th. Declarations against interest by persons deceased.

7th. Declarations or entries made in the course of office or business (*res gestæ*).

8th. Testimony given by a witness on a former trial, since deceased.

9th. Admissions by parties in interest.

CHAPTER V.

HEARSAY TO PROVE GENERAL OR PUBLIC RIGHTS.

SECTION.

86. Admissible to prove Public Rights.
87. Meaning of Terms "Public" and "General."
88. When Independent Proof is not necessary.
89. Application of the Exception.
90. Instances in which such Evidence has been rejected.

Sec. 86. Admissible to prove Public Rights.

Hearsay evidence is admissible as to questions relating to matters of public or general interest.[1] The term "interest," as employed in this rule, means *pecuniary* interest, *or some interest by which the legal rights or liabilities of a class of the community are affected;* and the grounds of admissibility are, that, as the origin of such rights are generally ancient and obscure, they are usually incapable of direct proof, and because, as to local matters, all persons living in the neighborhood and interested in them are likely to be conversant, as common rights are naturally the subject of common and public conversation, in the course of which statements are made which, uncontradicted, are likely to be true, and thus a trustworthy reputation may arise from the concurrence of many unconnected with each other, and interested in investigating the truth;[2] and it is this prevailing current of assertion that is resorted to as evidence, for it is to this that every member of the community is supposed to be privy, and to contribute his share.[3]

Sec. 87. Meaning of the Terms "Public" and "General."

In speaking of matters of public and general interest, the terms public and general are sometimes used as synonyms,

[1] Berkley Peerage Case, 4 Camp. 415; Morewood *v.* Woods, 14 East, 329; Weeks *v.* Sparke, 1 M. & S. 686; R. *v.* Bedfordshire, 4 E. & B. 535.

[2] Lord Campbell in R. *v.* Bedfordshire, 4 E. & B. 541.

[3] Wright *v.* Tatham, 7 Ad. & El. 366.

meaning merely what concerns a multitude of persons.[1] But, in regard to the admissibility of hearsay testimony, a distinction has been taken between them; the term *public* being strictly applied to that which concerns every member of the State; and the term *general* being confined to a lesser, though still a considerable, portion of the community. This distinction should be carefully attended to, because in matters strictly public, such, for example, as a claim of highway or a right of ferry, reputation from any one appears to be receivable; and although declarations would be almost worthless, unless made by persons who, by living in the neighborhood, or by frequently using the road or ferry, or the like, are shown to have had some means of knowledge; yet the want of such proof of their connection with the subject in question seems to affect the value only, and not the admissibility, of the evidence. If, however, the right in dispute be simply general; that is, if those only who live in a particular district, or adventure in a particular enterprise, are interested in it, hearsay from persons, wholly unconnected with the place or business, would be, not only of no value, but probably altogether inadmissible.[2]

Thus, in an action of trespass *quare clausum fregit*, where the defendant pleaded in bar a prescriptive right of common in the *locus in quo*, and the plaintiff replied, prescribing in right of his messuage to use the same ground for tillage with corn, until the harvest was ended, traversing the defendant's prescription; it appearing that many persons, beside the

[1] Pim *v.* Curell, 6 M. & W. 234.

[2] Crease *v.* Barrett, 1 C., M. & R. 929, *per* PARKE, B. By the Roman law, reputation, or common fame, seems to have been admissible in evidence, in all cases; but it was not generally deemed sufficient proof, and, in some cases, not even *semiplena probatio*, unless corroborated; *nisi aliis adminiculis adjuvetur*. Mascardus, De Prob., vol. 1, Concl. 171, n. 1; Concl. 183, n. 2; Concl. 547, n. 19. It was held sufficient, *plena probatio*, wherever, from the nature of the case, better evidence was not attainable; *ubi a communiter accidentibus, probatio difficilis est, fama plenam solet probationem facere; ut in probatione filiationis*. But Mascardus deems it not sufficient, in cases of pedigree within the memory of man, which he limits to fifty-six years, unless aided by other evidence—*tunc nempe non sufficeret publica vox et fama, sed una cum ipsa deberet tractatus et nominatio probari, vel alia adminicula urgentia adhiberi*. Mascard. De Prob. vol. 1, Concl. 411, n. 1, 2, 6, 7.

defendant, had a right of common there, evidence of reputation as to the plaintiff's right was held admissible, provided it were derived from persons conversant with the neighborhood.[1] So, where the question was, whether Nottingham Castle was within the hundred of Broxtowe, certain ancient orders, made by the Justices at the Quarter Sessions for the county, in which the castle was described as being within that hundred, were held admissible evidence of reputation; the justices, though not proved to have been residents within the county or hundred, being presumed, from the nature and character of their offices alone, to have had sufficient acquaintance with the subject in dispute, to make the statements in their orders admissible.[2] Again, where the question related to the custom of mining in a particular district, persons, under whose estates the minerals lay, with respect to which the custom was said to exist, were held to be sufficiently connected with the subject to make their declarations evidence, as they were more likely than others living at a distance to become adventurers, and consequently to be subjected to the operation of the custom.[3] But where the point at issue was, whether the city of Chester anciently formed part of the County Palatine, an old document, purporting to be a decree of certain law officers and dignitaries of the crown, not having authority as a court, was held inadmissible as evidence of reputation, because those personages

[1] Weeks *v.* Sparke, 1 M. & Sel. 679, 688, 689, *per* Le Blanc, J. The actual discussion of the subject in the neighborhood, was a fact also relied on, in the Roman law, in cases of proof by common fame. "*Quando testis vult probare aliquem scivisse, non videtur sufficere, quod dicat ille scivit quia erat vicinus; sed debet addere, in vicinia hoc erat cognitum per famam, vel alio modo; et ideo iste, qui erat vicinus, potuit id scire.*" J. Menochius, De Præsump. tom. 2, lib. 6, Præs. 24, n. 17, p. 772. See also Mascardus, de Prob. vol. 1, p. 389, 390, Concl. 395, n. 1, 2, 19, 9, where the law is thus laid down:—"*Confines probantur per testes. Verum scias velim, testes in hac materia, qui vicini, et circum ibi habitant, esse magis idoneos quam alios. Si testes non sentiat commodum vel incommodum immediatum, possint pro sua communitate deponere. Licet hujusmodi testes sint de universitate, et deponant super confinibus suæ universitatis, probant, dummodum præcipuum ipsi commodum non sentiant, licet inferant commodum in universum.*"

[2] Duke of Newcastle *v.* Broxtowe, 4 B. & Ad. 273.

[3] Crease *v.* Barrett, 1 C.,M. & R. 919, 928–930.

had no peculiar knowledge of the subject, excepting what they derived in the course of that unauthorized proceeding.[1] Thus it appears that *competent knowledge in the declarant* is, in all cases, an essential prerequisite to the admission of his testimony; and although all the Queen's subjects are presumed to have that knowledge, in some degree, where the matter is of public concernment, yet, in other matters, which are not strictly public, though they are interesting to many persons, some particular evidence of such knowledge is generally required.

Sec. 88. When Independent Proof is not Required.

If the quality of the hearsay itself raises a natural inference that it was derived from persons acquainted with the subject, the courts will not require independent proof of that fact; and, therefore, where the question turned on a manorial custom, depositions, purporting to have been made by copyholders in an ancient suit between a former lord and a person claiming admission to a copyhold, were admitted in evidence without proof that the persons making them were either copyholders, or were otherwise acquainted with the customs of the manor; for the courts assumed that such persons would not have been brought forward as witnesses, had they been ignorant of the subject.[2] So, an ancient unsigned customary of a manor, which purported to be *ex assensu omnium tenantium*, and which had been handed down with the court rolls from steward to steward, was received as evidence to prove the course of descent within the manor.[3] But where, in order to prove the boundaries of a manor, an ancient survey was produced from the proper custody, which purported to have been made in the time of Queen Elizabeth by a deputy surveyor appointed by the crown, and to have been founded on the presentments of certain tenants of the manor, whose names were appended to it, the court rejected the document, *on the ground that no proof had been given*

[1] Rogers *v.* Wood, 2 B. & Ad. 245, 256, recognized by the Court of Exchequer in Crease *v.* Barrett, 1 C., M. & R. 928, 929; see also Evans *v.* Taylor, 7 Ad. & El. 617, 626, 627.

[2] Freeman *v.* Phillipps, 4 M. & Sel. 486.

[3] Denn *v.* Spray, 1 T. R. 456, 473; see also Chapman *v.* Cowlan, 13 East, 10.

that the deputy surveyor had any authority to institute the inquiry; and stripped of this authority he not only had no right to make any kind of return, but the presumption that he did make one fell to the ground. The paper might have been written by any clerk idling in the office where it was found, from his own imagination, or compiled, possibly, by some interested person in furtherance of a sinister object of his own.[1]

Sec. 89. Application of the Exception.

It may be expedient to enumerate a few of the principal questions, which have been deemed to involve matters of public or general interest, and to contrast these with some others, which the courts have considered to be of too private a nature to allow of their being illustrated by evidence of reputation. Thus, hearsay has been admitted where the question related to a right of common,[2] a parochial[3] or other distinct *modus*,[4] a manorial custom,[5] a custom of mining in a particular district,[6] a custom of a corporation to exclude foreigners from trading within a town,[7] the limits of a town,[8] the boundary between counties, parishes, hamlets or manors,[9] or between *old* and *new* land in a manor,[10] a claim of tolls on a public road,[11] the fact whether a road was public or private,[12] a prescriptive liability to repair sea-walls[13] or bridges,[14] a claim of highway,[15] a right of ferry,[16] the fact

[1] Evans *v.* Taylor, 7 Ad. & El. 617, 626, 627; 1 Taylor on Ev. §§ 418–422.

[2] Weeks *v.* Sparke, 1 M. & S. 679.

[3] Moseley *v.* Davies, 11 Price, 162; White *v.* Lisle, 4 Madd. Ch. 214, 224; Short *v.* Lee, 2 Jac. & W. 464, 473.

[4] Rudd *v.* Wright, 1 Ph. Ev. 240.

[5] Doe *v.* Sisson, 12 East, 62.

[6] Crease *v.* Barrett, 1 C., M. & R. 919, 928–930.

[7] Davies *v.* Morgan, 1 C. & J. 587.

[8] Ireland *v.* Powell, cited Pea. Ev. 16, *per* Chambre, J., and recognized by Williams, J., in R. *v.* Bliss, 7 Ad. & El. 555.

[9] Nicholls *v.* Parker, 14 East, 331, *n.*; Brisco *v.* Lomax, 8 A. & E. 198; 3 N. & P. 388, S. C.; Evans *v.* Rees, 10 Ad. & El. 151; Plaxton *v.* Dare, 10 B. & C. 17; Thomas *v.* Jenkins, 6 Ad. & El. 525.

[10] Barnes *v.* Mawson, 1 M. &. S. 81.

[11] Brett *v.* Beales, M. & M. 416, 418, *per* Lord Tenterden.

[12] R. *v.* Bliss, 7 Ad. & El. 555, *per* Williams, J.

[13] R. *v.* Leigh, 10 Ad. & El. 398, 409, 411.

[14] R. *v.* Sutton, 8 A. & E. 516; 3 N. & P. 569, S. C.

[15] Crease *v.* Barrett, 1 C., M. & R. 929, *per* Parke, B.; Reed *v.* Jackson, 1 East, 355.

[16] Pim *v.* Curell, 6 M. & W. 234.

whether land on a river was a public landing-place or not,[1] the jurisdiction of a court and the fact whether it was a court of record or not,[2] the existence of a manor,[3] a prescriptive right of toll on all malt brought by the west country barges to London,[4] a right, by immemorial custom, claimed by the deputy day meters of London, to measure, shovel, unload and deliver all oysters brought by boat for sale within the limits of the port of London,[5] a claim by the lord of a manor to all coals lying under a certain district of the manor,[6] a custom of electing churchwardens by a select committee,[7] and a prescriptive right to free warren as appurtenant to an entire manor.[8] On a question whether a certain road was a highway, a copper-plate map was produced, in which it was so described; it purported to have been taken by the direction of the churchwardens, and proof was offered that it was generally received in the parish as an authentic map; but LORD KENYON rejected the evidence.[9] So the production of an old printed map of a county from the custody of a county magistrate, who had it some years in his possession, does not make it admissible to prove the bounds of the county.[10] It would seem, however, that if such a map had been supported by proof of its compilation by persons having particular means of knowledge of the bounds, or had been in some way sanctioned publicly as authentic, it might have been admissible as reputation; otherwise there is no reason for attaching more value to an engraved map than to a printed book as evidence of its contents; nor does the current use of it by those who reside in the district delineated in it imply an assent to all its details. An old map commonly used at a manor court to define the

[1] Drinkwater *v.* Porter, 7 C. & P. 181, *per* COLERIDGE, J.

[2] Goodtitle *v.* Dew, Pea. Add. R. 204.

[3] Steel *v.* Prickett, 2 Stark. 466, *per* ABBOTT, C. J.; Curzon *v.* Lomax, 5 Esp. 60, *per* LORD ELLENBOROUGH.

[4] City of London *v.* Clerke, Carth. 181.

[5] Laybourn *v.* Crisp, 4 M. & W. 320.

[6] Barnes *v.* Mawson, 1 M. & S. 77, 81. In that case there was evidence of an uniform exercise of the right.

[7] Berry *v.* Banner, Pea. 156.

[8] Earl of Carnarvon *v.* Villebois, 13 M. & W. 313.

[9] Pollard *v.* Scott, Peake, 18.

[10] Hammond *v.* Bradstreet, 10 Exch. 390.

limits of copyholds, is not evidence of a highway, though ways may be indicated upon it; especially if it does not purport to describe them as public ways.[1]

The proceedings of a public meeting called for the purpose of considering about repairing a way, at which several present signed a paper stating that it was not a public way, is evidence, though slight, against the right.[2] Even where general reputation is evidence, yet the tradition of a particular fact is not; as that a house once stood in a particular spot. Nor is reputation admissible evidence of a farm *modus*.[3] Where a question of a public way was in issue, the declarations of a deceased occupier of land made whilst planting a tree, stating that he planted it to show the boundary of the road, are not evidence of the public right, for it is not a statement of general reputation, but of a particular fact.[5] The declarations of a deceased lord of the manor as to the extent of the waste are not evidence in extension of it.[6] Where the question was, whether a place was within the limits of a hundred, ancient entries of orders of justices in sessions, stating the place to be within such limits, were held to be evidence of reputation, though the justices were not proved to have been resident within the hundred or county.[7] So the question being whether certain land is in the parish of A. or B., ancient leases, in which they are described as lying in parish B., are evidence that the land is in that parish.[8] In assumpsit for tolls by a lessee of the corporation of Cambridge, an old deed of composition between it and the university, recognizing the right, was admitted in behalf of the plaintiff, though not proved to have been acted upon.[9] But not of a mere award, not proved to have been acquiesced in, nor is an award *inter alios* evidence, as reputation, of the boundary of a parish and county.[10] The finding

[1] Pipe *v.* Fulcher, 1 E. & E. 111.
[2] Barraclough *v.* Johnson, 8 Ad. & El. 99.
[3] Ireland *v.* Powell, Peake Ev. 15.
[4] Pritchett *v.* Honeyborne, 1 Y. & J. 135.
[5] R. *v.* Bliss, 7 Ad. & El. 550.
[6] Crease *v.* Barrett, 1 C., M. & R. 919.
[7] Duke of Newcastle *v.* Broxtowe, 4 B. & Ad. 273.
[8] Plaxton *v.* Dare, 10 B. & C. 17.
[9] Brett *v.* Beales, M. & M. 416.
[10] Evans *v.* Rees, 10 Ad. & El. 151; Wiseman *v.* Mackenzie, 5 E. & B. 447.

of a jury, under a commission duly issued out of the duchy court of Lancaster, on the petition of the parties to ascertain the bounds of adjoining manors, was held evidence of such bounds.[1] But an interlocutory order of the same court, containing only a provisional arrangement between the parties, is not evidence of reputation.[2] Generally, a verdict, and judgment thereon, in a matter in which reputation is admissible evidence, is also admissible; so of a decree or inquest of office lawfully authorized. Reputation alone is said to be evidence of the existence of a manor;[3] but it seems that some foundation should be laid by proof of acts done, as holding courts, etc.; and the production of a deputation to kill game is not of itself sufficient proof even of a colorable title to a real manor, for the lord of a mere reputed manor may grant one.[4]

The rule with regard to the practice from whom the declarations proceed has been thus laid down: In cases of rights or customs which are not, strictly speaking, public, but are of a general nature and concern a multitude of persons, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighborhood. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary. But where the right is strictly public (a claim of highway, for instance), in which all the public are interested, it is difficult to say that there ought to be any such limitation. In a matter in which all are concerned, reputation from any one appears to be receivable, but almost worthless *unless it came from persons who are shown to have some means of knowledge*, as by living in the neighborhood, or frequently using the road in dispute.[5] Thus, a document purporting to be a decree of certain persons, the Lord Treasurer and Chancellor of the Exchequer, etc., who had no authority as a court, was held to be inadmissible evidence as reputation on a question

[1] Brisco *v.* Lomax, 8 Ad. & El. 198.
[2] Pim *v.* Curell, 6 M. & W. 234.
[3] Steel *v.* Prickett, 2 Stark. 463.
[4] Rushworth *v.* Craven, McCl. & Y. 417.
[5] *Per* PARKE, B., in Crease *v.* Barrett, 1 C., M. & R. 919; Doe *d.* Molesworth *v.* Sleeman, 9 Q. B. 301.

whether the city of Chester, before it was made a county itself, formed a part of the county palatinate, because those personages had from their situations no peculiar knowledge of the facts.[1] So the answers of the tenants of a manor to an old commission of survey issued by the lord, finding the bounds of the manor in his right to *wreck*, are evidence of the former, but not of the latter, they having no peculiar means of knowledge, and the lord's title to such a franchise not being a matter of public concern.[2] Such a claim of wreck is one affecting only the interest of the crown, and not the tenants; and the case differs in that respect from a right of free warren.[3]

Ancient answers of the customary tenants of a manor, stating the rights of the lord of the manor to *all* mines within it, are evidence even against the freeholders, for this claim affects all the tenants.[4] Declarations of old persons concerning the boundaries of parishes and manors have been admitted in evidence, though they were parishioners, and claimed right of common on the wastes which their declarations had a tendency to enlarge.[5] To prove the dedication of land to public use, this species of evidence is peculiarly applicable, and the declarations of the owner, and the use of the lands for public purposes for a long period of time, can often be shown in no other way.[6] In order to admit evidence of reputation, it is not necessary that the fact of user should be shown,[7] but such evidence without user is entitled to but little weight, and has been held not to be admissible at all.[8] The declarations of persons still alive, are not admissible in proof of reputation.[9]

Sec. 90. Instances in which such Evidence has been rejected.

On the other hand, evidence of *reputation has been rejected* where the question was, what usage had obtained in electing

[1] Rogers *v.* Wood, 2 B. & Ad. 245.

[2] Talbot *v.* Lewis, 1 C., M. & R. 495.

[3] Earl of Carnarvon *v.* Villebois, 13 M. & W. 313.

[4] Crease *v.* Barrett, *supra.*

[5] Nicholls *v.* Parker, 14 East, 531.

[6] Hunter *v.* Sandy Hill, 6 Hill (N. Y.), 407; Godfrey *v.* Alton, 12 Ill. 29.

[7] Crease *v.* Barrett, *ante.*

[8] Weeks *v.* Sparks, 1 M. & S. 686; Rushworth *v.* Craven, McCl. & Y. 417.

[9] Woolway *v.* Rowe, 1 Ad. & El. 117.

a schoolmaster to a grammar school,[1] whether the sheriff of the county of Chester or the corporation of the city of Chester were bound to execute criminals,[2] whether the lord of a manor had a prescriptive right to all wreck within his manorial boundaries,[3] whether the plaintiff was exclusive owner of the soil, or had a right of common only,[4] whether the land in dispute had been purchased by a former occupier, or was part of an entailed estate, of which he had been tenant for life,[5] what patron formerly had the right of presentation to a living,[6] whether a *farm modus* existed, and what was its nature,[7] whether a party had a private right of way over a particular field,[8] whether the tenants of a particular copyhold estate had the right of cutting and selling wood,[9] and what were the boundaries between two private estates.[10] Where, however, it was shown by direct testimony, the admission of which was unopposed, that the boundaries of the farm in question were identical with those of a hamlet, evidence of reputation as to the hamlet boundaries was let in for the purpose of proving those of the farm; for though it was objected that evidence should not be thus indirectly admitted in a dispute between private individuals, the court overruled the objection, MR. JUSTICE COLERIDGE observing that "he never heard that a fact was not to be proved in the

[1] Withnell *v.* Gartham, 1 Esp. 324, 325, *per* LORD KENYON.

[2] R. *v.* Antrobus, 2 Ad. & El. 793–795.

[3] Talbot *v.* Lewis, 1 C., M. & R. 495.

[4] Richards *v.* Bassett, 10 B. & C. 663, *semble, per* LITTLEDALE, J., *sed qu.*

[5] Doe *v.* Thomas, 14 East, 323.

[6] *Per* LORD KENYON, in R. *v.* Eriswell, 3 T. R. 723, questioning Bishop of Meath *v.* Lord Belfield, 1 Wils. 215.

[7] Wells *v.* Jesus College, 7 C. & P. 284, *per* ALDERSON, B.; White *v.* Lisle, 4 Madd. Ch. 214, 224, 225; Wright *v.* Rudd, cited 1 Ph. Ev. 241, *per* LORD LYNDHURST. See, however, Webb *v.* Petts, Noy, 44; Donnison *v.* Elsley, 3 Eag. & Y. 1396, n.; and cases cited 1 Ph. Ev. 241, n. 2.

[8] *Semble, per* DAMPIER, J., in Weeks *v.* Sparke, 1 M. & Sel. 691; and *per* LORD KENYON, in Reed *v.* Jackson, 1 East, 357.

[9] Blackett *v.* Lowes, 2 M. & Sel. 494, 500, *per* LORD ELLENBOROUGH.

[10] Clothier *v.* Chapman, 14 East, 331, n. By the Roman law, evidence of reputation seems to have been deemed admissible, even in matters of private boundary. See Mascard. de Prob. vol. 1, p. 391, Concl. 396.

same manner when subsidiary as when it was the very matter in issue."[1]

Reputation is admissible as well *against* as in favor of a public right, and it makes no difference whether the declarations expressly negative the right, or set up an inconsistent claim, or simply omit all mention of the right, at a time and upon an occasion when notice of it might reasonably be expected.[2] Reputation, tradition, or hearsay, as it may properly be called, is from necessity admissible to prove historical facts of former ages, about which no contemporaneous living person can testify. This species of evidence is disarmed of much of its danger from the permanent effects which are visible to confirm or contradict it, the number of sources whence it may spring, the number of persons interested in preserving the recollection of the matters in question, and the consequent facilities for detecting false testimony. Rights of public or general interest, which are supposed to have been exercised in times past, partake in some degree of the nature of historical facts, and especially in this, that it is barely possible to obtain original proof of them. The law, consequently, allows them to be proved by general reputation, that is, by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject,[3] and by old documents of various kinds, which, under ordinary circumstances, would be rejected for want of originality, etc. But in order to guard against fraud, it is an established qualification to the exception to the rule, that such declarations, in order to be admissible, *must have been made before any controversy arose relating to the matter about which they were made*, or, in other words, unless they were made *ante litem motam*. This qualification is of the highest importance, as, says MR. TAYLOR,[4] "the ground on which the declarations of deceased persons are admitted at all is, that they are the natural effusion of a party who is

[1] Thomas *v.* Jenkins, 6 Ad. & El. 525, 529. See also Brisco *v.* Lomax, 8 Ad. & El. 198, 213.

[2] COLERIDGE, J., in Drinkwater *v.* Porter, 7 C. & P. 181; Marquis of Anglesey *v.* Hatherton, 10 M. & W. 218.

[3] Crease *v.* Barrett, 1 C., M. & R. 919.

[4] Taylor on Ev. § 628 (7th ed.).

presumed to know the truth and to speak upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth;"[1] and no person is presumed to be thus indifferent in reference to matters in actual controversy, as, when a controversy has once commenced, people generally take sides, and what is then said by them, is said under the bias of their peculiar views or prejudice. Consequently all *ex parte* statements, whether under oath or not, are rejected if they were made subsequent to the date of the controversy.[2]

By the Roman law, the term *lis mota* was applied strictly to the commencement of the action, and had no reference to any antecedent period. But with us the term is given a broader signification, and is understood as being *the commencement of the controversy*, and not necessarily the commencement of the suit.[3] But it seems that whatever may be the precise limits of the rule of exclusion, *declarations will not be rejected because they were made for the express purpose of preventing a controversy*,[4] *nor*, if no dispute has arisen, *although made in direct support of the title of the declarant;*[5] *and the fact that the declarant stood, or believed that he stood, in pari jure with the party relying on the declaration*, will afford no ground for the rejection of the evidence.[6] In order to exclude this class of evidence upon the ground that a controversy had arisen before the declarations were made, *it must appear that the dispute related to the particular subject in issue.* BAYLEY, J.,[7] announced the rule as it is now generally held, as follows: "The distinction has been correctly taken that *where the lis mota was on the very point*, the declarations of persons would not be evidence, because you can-

[1] LORD ELDON in Whitelocke *v.* Baker, 13 Ves. 514.

[2] Berkley Peerage, 4 Camp. 401; Richards *v.* Bassett, 10 B. & C. 657; Monkton *v.* Att'y-Gen., 2 Russ. & My. 160.

[3] Berkley Peerage, 4 Camp. 417; Monkton *v.* Att'y-Gen., 2 Russ. & My. 161; Davies *v.* Lowndes, 7 Scott N. R. 214; Slaucy *v.* Wade, 1 My. & Cr. 338.

[4] Berkley Peerage, *ante.*

[5] Doe *v.* Davies, 16 L. J., N. S. 222, Q. B.

[6] Doe *v.* Tarver, Ry. & M. 141; Moseley *v.* Davies, 11 Price, 162; Nicholls *v.* Parker, 14 East, 331, n.; Davies *v.* Morgan, 1 C. & J. 593; Harwood *v.* Sims, Wighter, 112; Deacle *v.* Hancock, 13 Price, 296.

[7] Freeman *v.* Phillips, 4 M. & S. 497.

not be sure that, in admitting the depositions of witnesses selected and brought forward on a particular side of the question, who embark to a certain degree with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*, and consequently the objection does not apply." But while in one case[1] it was insisted by MANSFIELD, J., that it made no difference, so far as the question of admissibility was concerned, whether the declarant knew of the existence of the controversy or not, yet in the same case BARON GRAHAM took a contrary ground, and insisted that such declarations are admissible *where the declarant could not have known that a suit was commenced or contemplated*, and this now seems to be the generally accepted rule.[2] The entire rule as to *lis mota* applies with equal force in reference to declarations of persons offered in proof of pedigree.

Hearsay is good evidence to prove who is a person's grandfather, when he married, what children he had, or the death of a relation beyond sea, etc.[3] Thus the declaration of a deceased parent and another relative were admitted to show which of several children born at a birth was the eldest.[4] So declarations of deceased members of a family

[1] Berkley Peerage, 4 Camp. 417.

[2] BROUGHAM, J., in Monkton *v.* Att'y-Gen., 2 Russ. & My. 147; Reilley *v.* Fitzgerald, 6 Ir. Eq. 349.

[3] Buller's Nisi Prius, 294–5; Bridger *v.* Huett, 2 F. & F. 35.

[4] 12 Vin. Abr. 247.

CHAPTER VI.

HEARSAY TO PROVE PEDIGREE AND RELATIONSHIP.

SECTION.

91. Pedigree, How may be Proved.
92. Evidence should come from Undoubted Source.
93. Rule in this Country.
94. Admissible to Prove Marriage, Etc.
95. Old Documents, Inscriptions, Etc., Admissible to Establish.
96. Entries in Family Bibles, Etc.
97. Declarations of Deceased Persons.
98. Hearsay of What Persons Admissible in Questions of Pedigree.

Sec. 91. Pedigree, How may be Proved.

A second exception to the general rule rejecting hearsay evidence is, made in respect to proof of pedigree,[1] and this exception is recognized upon the ground of necessity, and is founded upon the obvious difficulty of tracing descent and relationship of deceased members of families by any other evidence. And it is upon this ground that the declarations of deceased parents are received relative to the legitimacy of children,[2] and general reputation, in this respect, in the neighborhood, has been held admissible; but the value of such evidence will depend upon the circumstances of each case,[3] made of course "*ante litem motam*."[4] The general reputation of a family, proved by a surviving member of it; entries contained in books, such as family bibles, if produced from the proper custody, even although there be no evidence of the handwriting or authorship of such entries;[5] corre-

[1] Kaywood *v.* Barnett, 3 Dev. & B. (N. C.) L. 91; Elliott *v.* Piersall, 1 Pet. (U. S.) 328; Jackson *v.* Cooley, 8 John. (N. Y.) 128; Waldron *v.* Tuttle, 4 N. H. 371; Kelly *v.* McGuire, 15 Ark. 555; Crawford *v.* Blackburn, 17 Md. 49; Copes *v.* Pearce, 7 Gill (Md.), 247.

[2] Jewell *v.* Jewell, 17 Pet. (U. S.) 213; S. C., 1 How. (U. S.) 219; Gaines *v.* New Orleans, 6 Wall. (U. S.) 642.

[3] Gaines *v.* New Orleans, *ante*.

[4] See 1 Phill. Ev. 206, 10th ed.; Gee *v.* Ward, 7 E. & B. 509.

[5] Hubbard *v.* Lees, L. Rep., 1 Ex. 255, 258.

spondence between relatives; recitals in deeds; descriptions in wills; inscriptions on tombstones, rings, monuments, or coffin plates; charts of pedigrees, made or adopted by deceased members of the family, etc., have severally been held receivable in evidence for this purpose.[1] And it is impossible to dispense with this kind of evidence, *especially in proof of remote and collateral matters;* but great care should be observed when the actual point in issue in a cause depends wholly or chiefly upon it. It is, from its nature, very much exposed to fraud and fabrication; and even assuming the declaration, inscription, etc., correctly reported by the medium of evidence used, many instances have been shown how erroneous is the assumption that all the members of a family, especially in the inferior walks of life, are even tolerably conversant with the particulars of its pedigree.[2]

Sec. 92. Evidence should come from Undoubted Source.

The evidence should come from some one connected with the family whose pedigree or relationship to a deceased person is sought to be established, by blood, or from some one who has some personal knowledge of the family, or the facts of which they speak, or those who have derived knowledge relative thereto from persons connected with the family, or those particularly acquainted therewith, or the evidence will not be received;[3] as to prove who are heirs of a deceased person;[4] so, to prove who was the mother of a child, the declarations of a father

[1] In a suit in which the plaintiff alleged that he was the natural son of A., a declaration by a deceased brother of A. that the plaintiff was A.'s natural son, was held to be inadmissible. Crispin *v.* Doglioni, 32 L. J., P. & M. 109.

[2] See the judgment of the master of the rolls in Crouch *v.* Hooper, 16 Beav. 182.

[3] Carter *v.* Buchanan, 9 Ga. 539; Jackson *v.* Browner, 18 Johns. (N. Y.) 37; Moers *v.* Bunker, 29 N. H. 420; Strickland *v.* Poole, 1 Dallas (U. S.), 14; Kelly *v.* McGuire, 15 Ark. 555; Greenwood *v.* Spiller, 3 Ill. 502; Armstrong *v.* McDonald, 10 Barb. (N. Y.) 300; Binney *v.* Ham, 3 A. K. Marsh. (Ky.) 322; Crawford *v.* Blackburn, 17 Md. 49; Kaywood *v.* Barnett, 3 Dev. & B. (N. C.) 91; Chapman *v.* Chapman, 2 Conn. 347; Everingham *v.* Mesroom, 2 Brev. (S. C.) 461; Gilchrist *v.* Martin, 1 Bailey (S. C.), 492; Webb *v.* Richardson, 42 Vt. 465; Jackson *v.* Cooley, 8 Johns. (N. Y.) 128; Elliott *v.* Piersoll, 1 Pet. (U. S.) 328; Waldron *v.* Tuttle, 4 N. H. 371; Stein *v.* Bowman, 13 Pet. (U. S.) 209.

[4] Greenwood *v.* Spiller, 3 Ill. 502.

in reference thereto may be received ;[1] so, too, the declarations of a mother in reference to the paternity of her son may be given in evidence ;[2] so the declaration of any deceased person, as to who were his or her heirs ;[3] so to prove the death of a person after the lapse of a long time, in which he has not been heard from.[4] But this species of evidence, coming from living persons connected with the persons deceased. and the declarations of such deceased persons, are entitled to more weight than those coming from persons who had no connection with the family.[5] And all such evidence is to be weighed in view of the circumstances under which the declarations were made, whether any litigation had been commenced involving the relationship, and all the circumstances calculated to throw any light upon the motives or interest of the person in making them.[6]

Sec. 93. Rule in this Country.

The rule in reference to this class of evidence was given by the court in a case in the United States Supreme Court,[7] thus : "The hearsay evidence admissible in cases of pedigree is limited to those connected with the family who are supposed to have known the relationship existing, and must have been made before the suit was commenced." In a New York case[8] it was held that "where the witnesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected or particularly acquainted with the family, but speak generally of what they have heard or understood, such evidence is insufficient to establish pedigree." In another case,[9] where a letter from a deceased

[1] United States *v.* Saunders, 1 Hempst. (Tenn.) 483.

[2] Canjolle *v.* Ferrie, 26 Barb. (N. Y.) 177.

[3] Moffit *v.* Witherspoon, 10 Ired. (N. C.) 185.

[4] Miner *v.* Boneham, 15 Johns. (N. Y.) 226 ; Stouvenel *v.* Stevens, 2 Daly (N. Y. C. P.), 319.

[5] Saunders *v.* Fuller, 4 Humph. (Tenn.) 516.

[6] United States *v.* Saunders, 1 Hempst. (Tenn.) 483 ; Canjolle *v.* Ferrie, 2 Barb. (N. Y.) 177.

[7] Stein *v.* Bowman, 13 Pet. (U. S.) 209.

[8] Jackson *v.* Browner, 18 Johns. (N. Y.) 37.

[9] Elliot *v.* Piersoll, 1 Pet. (U. S.) 328.

member of a family, stating the pedigree of the family, sworn to by the wife as having been written by her husband, and as containing facts of which he had often spoken to her in his life-time, was offered, it was held that both the letter and the testimony of the wife were competent evidence.

So, too, in questions of pedigree the declarations of deceased members of a family in reference to marriages are admissible; but when the marriage is essential to be established as a substantive fact, it cannot be established by such declarations.[1] The date of the birth of a child may be proved by the declarations of deceased members of the family, even though there is a family register in which the birth of the child is registered. The reason for this rule is, that both species of evidence are of equal weight and character, the one not being entitled to any more consideration than the other.[2] But its age cannot be established in this way;[3] nor the *place* of its birth;[4] or any fact that is susceptible of proof by witnesses who speak from their own knowledge.[5]

Sec. 94. Admissible to Prove Marriage, Etc.

So hearsay evidence is admissible in some States to prove the marriage of parties by proving cohabitation.[6] So it is competent to prove, by the declaration of the parents of a child, whether they were married when the child was born; but such evidence is not admissible to prove that children born in wedlock are illegitimate by reason of non access.[7] so such evidence is admissible to prove whom a man married, or whom a woman married, what children they had, whether legitimate or illegitimate, that either died abroad; and these facts may be established by the declarations of deceased mem-

[1] Westfield *v.* Warren, 8 N. J. L. 249.

[2] Clements *v.* Hunt, 1 Jones (N. C.), 400.

[3] Albertson *v.* Robertson, 1 Dallas (U. S.), 9.

[4] Wilmington *v.* Burlington, 4 Pick. (Mass.) 174; Shearer *v.* Clay, 1 Lit. (Ky.) 260; Independence *v.* Pompton, 4 Halst. (N. J.) 209; Brooks *v.* Clay, 3 A. K. Marsh. (Ky.) 545.

[5] Mima Queen *v.* Hepburn, 7 Cranch (U. S.), 290.

[6] O'Gara *v.* Eisenlohr, 38 N. Y. 296.

[7] Stevens *v.* Moss, Cowper, 491; Bowles *v.* Bingham, 2 Munf. (Va.) 442.

bers of the family; but the declarations of those not connected with the family (as neighbors or acquaintances) are not receivable.[1]

Sec. 95. Old Documents, Inscriptions, Etc., Admissible to Establish.

So in such cases recitals in old deeds are evidence;[2] inscriptions on old gravestones, the finding of a special verdict between other members of the family stating a pedigree, the statement of a pedigree in an old bill in chancery, as well as herald books and entries in family bibles;[3] but, so far as the allegations in a bill in chancery are concerned, it is proper to say that generally, under the modern rules of evidence, such evidence is not regarded as admissible; but if the circumstances, the relations of the parties and the nature of the issue are such as to afford no ground for supposing that the orator's mind had any bias, and that, so far as these facts are concerned, he had no interest to serve, there can be no question but that the evidence would be received for what it was worth in the establishment of a pedigree.[4] So statements in old wills bearing upon questions of pedigree or relationship, although the will is canceled, and never was operative, but which was found among the papers of the testator, a deceased member of the family, whose pedigree are in question, is admissible.[5] So a register of births and marriages kept in the records of a town is admissible on questions of pedigree.[6] So *ex parte* affidavits taken abroad have been held admissible to prove pedigree, and to establish boundaries; also to establish the identity of a person.[7] So depositions of deceased witnesses, used in a

[1] Vowles *v.* Young, 13 Ves. Jr. 140; Whitlock *v.* Baker, id. 511.

[2] Little *v.* Palister, 4 Me. 209; Buller's Nisi Prius, 233, 294; Morris *v.* Vandever, 1 Dal. (U. S.) 67; Paxton *v.* Price, 1 Yeates (Penn.), 500.

[3] Curtis *v.* Patton, 6 S. & R. (Penn.) 135; Kidney *v.* Cockburn, 2 R. & M. 163; Taylor *v* Cole, 7 T. R. 3; Lovell *v.* Arnold, 2 Munf. (Va.) 167; Pegram *v.* Jabell, 2 Harr. & Munf. (Va.) 281; Whittuck *v.* Waters, 4 C. & P. 376; Goodright *v.* Moss, 2 Cowp. 594.

[4] Berkley's Peerage Case, 2 Bing. 86.

[5] Johnson *v.* Earl Pembroke, 11 East, 503.

[6] Miner *v.* Boneham, 15 Johns. (N. Y.) 226.

[7] Taylor *v.* Simpson, 2 Dall. (U. S.) 117; Sturgeon *v.* Waugh, 2 Yeates (Penn.), 467; Lilly *v.* Kintzmiller, 1 id. 28.

cause between other parties, are admissible upon a question of pedigree, whether taken before or after the litigation commenced in which the question of pedigree is involved.[1] Inscriptions upon rings worn by a former member of the family are held admissible to prove pedigree.[2]

LORD ERSKINE, in commenting upon the class of evidence competent to prove a pedigree, said: "Upon questions of pedigree, inscriptions upon tombstones are admitted, as it must be supposed that the relations of a family would not permit an inscription without foundation to remain. So engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it." Charts of pedigree hung up in a family mansion, or in a situation to indicate that it was recognized and accepted by the family as correct;[3] coat armor,[4] and *mural inscriptions*, giving an historical account of a family, placed in a chancel which was formerly used as a burial place for the family, located in a parish where the family were long resident proprietors, have been also held admissible; and where the articles themselves cannot be produced, copies thereof may be used.[5] In this case, which involved a question of pedigree, the existence of the mural inscriptions and their obliteration, about twenty-four years before the trial, was established; and the court held that a copy thereof was competent evidence, provided the genuineness of the original inscriptions was established. This class of evidence, however, may always be impeached, and MR. PHILLIPS, in vol. 1, p. 222 of his work on Evidence, gives several instances in which that species of evidence has been completely overthrown. None of this species of evidence is conclusive, but its genuineness and the weight to be given it depend largely upon the circumstances of each case, the condition in which it was found, and a multitude of circum-

[1] Peake's Ev. 24, note, citing MS. case of Bordereau *v.* Montgomery; Jenkins *v.* Tom, *et al.*, Wash. (U. S.) 123; Lovell *v.* Arnold, 2 Munf. (Va.) 167.

[2] Vowles *v.* Young, 13 Ves. 144.

[3] Goodright *v.* Moss, 2 Cowper, 594.

[4] Cooke's Littleton, 27 *a*.

[5] Slaney *v.* Ward, 1 My. & Cr. 354.

stances that tend to convince the mind that a thing is real or spurious, in reference to which no rules can be given.

So it may be said, generally, that any species of evidence tending to show the declarations of deceased relatives upon the question of relationship, which is established as genuine, and which leaves no doubt as to their understanding of the matter, is always admissible to establish pedigree. The register of births, deaths or marriages, in a family bible,[1] to which all the family has access, gives it that validity which it would not have if the book remained in the exclusive possession of the father. Entries in family bibles have, therefore, become common evidence of pedigree where there is no register of births or baptism, or entries in the diary of a physician who was present at the birth of a child.[2] So, memoranda in other books, as an almanac,[3] a prayer book,[4] as well as entries in any other documents, books or papers, kept in and accessible to the family, are admissible.

Declarations in a family, descriptions in wills, inscriptions upon monuments, in bibles or other books, and in registry books, are all admitted, upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion where the mind stands in an even position, without any temptation to exceed or fall short of it.[5]

Sec. 96. Entries in Family Bibles, Etc.

Entries in a family bible are admissible in evidence, on the ground that being in that place, they are to be taken as assented to by those having the custody of the book; proof of the handwriting of the entries is therefore immaterial.[6] It seems, however, that in the case of any other

[1] Leggett *v.* Boyd, 3 Wend. (N. Y.) 376; Goodright *v.* Moss, Cowp. 594; Whitlock *v.* Baker, 13 Vesey, 511; Higham *v.* Ridgway, 10 East, 120.

[2] Ames *v.* Middleton, 23 Barb. (N. Y.) 571.

[3] Herbert *v.* Tucknall, L. Raym. 84.

[4] Leigh's Peerage, printed in 1829, p. 310.

[5] *Per* Lord Eldon, Whitelocke *v.* Baker, 13 Ves. 514; Higham *v.* Ridgway, 10 East, 109; Berkley Peerage Case, 4 Camp. 418. And see the Slane Peerage Case, 5 Cl. & F. 23; and the Vaux Peerage, ib. 526.

[6] Hubbard *v.* Lees, L. R., 1 Ex. 255. See also Berkley Peerage Case, 4 Camp. 421, *per* Lords Ellenborough and Redesdale.

book the entries must be proved to have been made by a member of the family ;[1] or that they have been treated by a relative as a correct family memorial.[2] A pedigree which has long hung up in a family mansion is good evidence in such cases ;[3] or a marriage certificate kept by the family.[4] A minute-book of a visitation, signed by the heads of the family, has been admitted, though produced from a private library.[5] A signed pedigree, delivered to the Herald's College by virtue of a commission under which the college was authorized to receive and enroll such pedigrees was admitted.[6] So, a paper in the handwriting of a deceased member of the family, purporting to give a genealogical account of the family, was held admissible, though never made public by the writer, erroneous in many particulars, and professing to be founded *partly* on hearsay.[7] So, a ring, worn publicly, stating the date of the person's death whose name is engraved upon it. So, a description of a party as "daughter and heir," in a deed signed by the party so described.[8] But an old pedigree, professing on the face of it to be compiled from "registers, wills, monumental inscriptions, family records and history," and going back to a fabulous date, is not evidence, though proved to be signed by members of the family, except so far as it relates to persons presumably known to them, or respecting whom they may have obtained information from other members of the family. Whether the *mere recognition* of a pedigree by a deceased ancestor will make it legitimate evidence (except against claimants under him), is doubtful.[9] The ground upon which the inscription on a tombstone, or a tablet in a church, is admitted is, that it is presumed to have been put there by a member of the family cognizant of the facts, and whose declaration would be evidence.[10] The memoranda of

[1] Tracy Peerage, Hubback Evid. of Succession, 673.

[2] Hood *v.* Beauchamp, 8 Sim. 29.

[3] Goodright *v.* Moss, Cowp. 594.

[4] Jenkins *v.* Davies, 10 Q. B. 314.

[5] Pitton *v.* Walker, 1 Stra. 162.

[6] Shrewsbury Peerage Case, 7 H. L. C. 19.

[7] Monkton *v.* Att.-Gen., 2 Russ. & My. 147.

[8] Jenkins *v.* Davies, *supra;* Smith *v.* Tebbitt, L. R., 1 P. & M. 354.

[9] Davies *v.* Lowndes, 6 M. & Gr. 471.

[10] PARKE, B., in Davies *v.* Lowndes, 512.

a parent are good evidence to prove the *time* of the birth of a child.[1]

Sec. 97. Declarations of Deceased Persons.

But the declaration of a father as to the *place* of birth of a son was considered inadmissible, as being a mere question of locality, and not of pedigree.[2]

Where statements contained in monumental inscriptions, and declarations made by a deceased relation, were offered in evidence upon the trial of an issue out of chancery to prove the *ages* of the parties referred to, TINDAL, C. J., rejected the evidence; but LORD BROUGHAM, C., after argument, expressed a very strong opinion in favor of it, and afterwards stated that he had the concurring opinions of LITTLEDALE, J., and PARKE, J.; but the suit being compromised, no further opinion was delivered.[3] An inscription on a tombstone, stating the death of a party at the age of 90, was admitted as evidence of the age.[4] So, an old tracing from an effaced monument has been admitted;[5] a bill in chancery by a father, stating his pedigree.[6] An *answer* in chancery, sworn *ante litam motam*, seems unexceptionable

[1] Herbert *v.* Tuckal, T. Raym. 84; Brune *v.* Rawlings, 7 East, 290.

[2] R. *v.* Erith, 8 East, 542. So, in Shields *v.* Boucher, 1 De G. & Sm. 40, WILDE, C. J., rejected, upon the trial of an issue, declarations of a relation as to the part of England from which he had originally come; but on moving for a new trial, KNIGHT-BRUCE, V.-C., expressed a strong opinion in favor of their admissibility in a case of mere genealogy, and with a view to identify ancestors, and distinguished R. *v.* Erith, *supra*. *Accord. per* KINDERSLEY, V.-C., in Bauer *v.* Mitford, 7 W. R. 570, June, 1859; and declarations of a party, showing that he has or had relations living at A., have been admitted to identify persons whose existence is proved *aliunde*. Rishton *v.* Nesbitt, 2 M. & Rob. 554; Hood *v.* Beauchamp, Hubback Evid. of Succession, 468, cited 1 Tayl. Evid., § 582. The declarations of a party as to *his own* illegitimacy, or place of birth, seem inadmissible except against himself, or those claiming under him by title posterior to the declaration. R. *v.* Rishworth, 2 Q. B. 476.

[3] Kidney *v.* Cockburn, 2 Russ. & My. 167.

[4] Rider *v.* Malbone, *cor.* LITTLEDALE, J., cited id., pp. 169, 170.

[5] Slaney *v.* Wade, 7 Sim. 595.

[6] Taylor *v.* Cole, 7 T. R. 3, n. But this is contrary to the resolution of the judges in the Banbury Peerage Case, 2 Selw. N. P, 2nd ed. 773, and to Boileau *v.* Rutlin, 2 Exch. 678.

as evidence of pedigree incidentally set forth in it.[1] The recital in a family conveyance by a trustee is evidence of parentage.[2] So an old and cancelled will has been allowed as evidence of the existence and relative ages of certain deceased members of the family from whom both parties derived title.[3] The probate of a will is not *primary* evidence for this purpose.[4] The will itself and signature of the testator must be proved, unless the age of the document or other circumstances dispense with such proof; it is said, however, that the "ledger book" or "original rolls" of the Ecclesiastical Court, containing an enrollment of the will, are admissible evidence to prove relationship.[5] It is not necessary that the declarations should be contemporaneous with the facts declared; thus a person's declaration, that his grandmother's maiden name was A. B. is admissible.[6] Nor is it necessary that the fact declared should be in the personal knowledge of the declarant; thus the declaration of A. as to what he heard from B. is admissible, if both be relations.[7] *Declarations of the kind above described are strictly admissible only in inquiries relating to descent or relationship, or in tracing the devolution of property.* In proving recent events, such as the place of birth, age, death, etc., of a person, where that fact is directly in issue, stricter proof may be reasonably required. General reputation is good evidence in pedigree cases, as of heirship,[8] or marriage;[9] but if it appears on cross-examination or otherwise that the witness is speaking of evidence given him by some individual, even as to general reputation, the evidence ceases to be admissible.[10]

[1] In the Wharton Peerage Case, 12 Cl. & Fin. 295, an answer, sworn but not filed, was rejected as evidence of pedigree.

[2] Slaney *v.* Wade, *supra.*

[3] Johnson *v.* Earl of Pembroke, 11 East, 504.

[4] Wilde *v.* Ormerod, 1 M. & Robb. 466; Dike *v.* Polhill, Ld. Raym. 744.

[5] B. N. P. 246.

[6] Lord Brougham, C., Monkton *v.* Att.-Gen., 2 Russ. & My. 158.

[7] Id. 162.

[8] Bridger *v.* Huett, 2 F. & F. 35.

[9] Evans *v.* Morgan, 2 C. & J. 453; Shedden *v.* Patrick, 2 Sw. & Tr. 170; 30 L. J., P. M. & A. 217; Campbell *v.* Campbell, L. R., 1 H. L. Sc. 201.

[10] Shedden *v.* Patrick, *supra.*

Sec. 98. Hearsay of What Persons Admissible in Questions of Pedigree.

The hearsay must be from persons having such a connection by blood or marriage with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and are not mistaken.[1] Declarations by a deceased person as to her own legitimacy are evidence.[2] So by a deceased husband as to the legitimacy of his wife, and as to the pedigree of her family, are evidence.[3] So the declaration of a wife, as to her husband's family ;[4] but not the declarations of her father, nor the declarations of illegitimate relations.[5] The declarations of servants and intimate acquaintances are not admissible.[6] The declarations of a deceased person as to the fact of his own marriage are evidence.[7] The declarations of a deceased mother as to the non-access of her husband are not evidence, on grounds of policy.[8] But where the non-access is admitted or established, her declarations may be proof of paternity.[9] Before any such declaration can be admitted in evidence, the relationship of the declarant by blood or marriage must be established by some proof independent of the declaration itself. It is the duty of the judge to decide whether this relationship is proved ; slight evidence will, however, be sufficient.[10] Old depositions in a suit, purporting on the face of them to be made by relations, but not proved *aliunde* to have been so made, are evidence,[11] the antiquity of the depositions dispensing with such extrinsic proof.

Although it is necessary to give evidence *dehors* to connect the persons making them with the family, yet where the

[1] Whitelocke *v.* Baker, 13 Ves. 514.

[2] Procur.-Gen. *v.* Williams, 31 L. J., P. M. & A. 157.

[3] Vowles *v.* Young, 13 Ves. 148 ; Doe *d.* Northey *v.* Harvey, Ry. & M. 297.

[4] Shrewsbury Peerage, 7 H. L. C. 1.

[5] Bamford *v.* Barton, 2 M. & Rob. 28 ; Crispin *v.* Doglioni, 3 Sw. & Tr. 44 ; 32 L. J., P. M. & A. 109.

[6] Johnson *v.* Lawson, 2 Bing. 86 ; S. C., 9 B. Moore, 183.

[7] B. N. P. 112 ; R. *v.* Bramley, 6 T. R. 330.

[8] R. *v.* Luffe, 8 East, 193 ; Goodright *v.* Moss, Cowp. 594.

[9] Legge *v.* Edmonds, 25 L. J. Ch. 125.

[10] Plant *v.* Taylor, 7 H. & N. 237 ; 31 L. J. Ex. 289 ; Smith *v.* Tebbitt, L. R., 1 P. & M. 354.

[11] Freeman *v.* Phillipps, 4 M. & S. 486.

question is whether A. be related to C., the declarations of B., who is proved to have been related to A., are evidence to prove C. related to A., without evidence *dehors* to show B. related to C.[1] When the judge has decided that the evidence is sufficient, he may receive the declaration, although the fact of relationship is the very point in issue in the cause,[2] and he is not bound to hear evidence on the *voir dire* to rebut the evidence of relationship.[3] It is no objection that the person who made the declaration stood in *pari casu* with the person tendering it in evidence.[4] In a claim of peerage a widow was admitted to prove the declarations of her deceased husband in support of her son's title, though the husband, if living, would have had the right which the declarations went to establish.[5] So declarations are admissible, though they tend to show the declarant's own title at the time, provided there was no *lis mota*.[6] The relative, whose declarations are offered, must be proved to be dead, before they can be admitted in evidence, unless, indeed, from the circumstances, his death may be presumed.[7]

[1] Monkton *v.* Att.-Gen., 2 Russ. & Myl. 156.

[2] Jenkins *v.* Davies, 10 Q. B. 314.

[3] Hitchins *v.* Eardley, L. R., 2 P. & M. 248.

[4] Monkton *v.* Att.-Gen., 2 Russ. & Myl. 159.

[5] Cited by ABBOTT, C. J., in Doe *d.* Tilman *v.* Tarver, Ry. & M. 141.

[6] Jenkins *v.* Davies, *supra*. But in Plant *v.* Taylor, *ante*, it was doubted whether a declaration by a person obviously in his own interest ought to be received. A deposition of a deceased relative, taken on a commission of inquiry as to the next of kin of a lunatic, is admissible to establish the title of the lunatic's heir at law. Gee *v.* Ward, 7 E. & B. 509.

[7] Butler *v.* Mountgarret, 7 H. L. C. 633.

CHAPTER VII.

HEARSAY.—ANCIENT POSSESSIONS.

SECTION.

99. Hearsay Admissible to prove, when.
100. Hearsay not Admissible to prove Private Title.
101. Perambulations.
102. Old Documents.
103. Manorial Documents.
104. Maps.
105. Verdicts, etc.
106. Judgments, Decrees and Orders.
107. Grounds upon which these Rules are founded.
108. Position of Parties presumed to be as stated in Ancient Documents.
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Sec. 99. Hearsay Admissible to prove, when.

Upon the same principle and for the same reasons that hearsay evidence is admitted upon questions of pedigree, are ancient documents admitted upon questions of ancient possessions and in support of them, and instruments which are more than thirty years old are treated as ancient documents, and when there is nothing suspicious about them, they are presumed to be genuine without express proof, the witnesses being presumed to be dead, and when they are found in the proper custody, and are corroborated by possession under them, they prove themselves.[1]

[1] Hedger *v.* Ward, 15 B. Mon. (Ky.) 106; Doe *v.* Roe, 31 Ga. 593; Carter *v.* Chaudron, 21 Ala. 72; Doe *v.* Eslaver, 11 id. 1028; Beall *v.* Deering, 7 id. 124. It is an established rule of evidence that a deed more than thirty years old may be given in evidence, without proof of its execution, when found in the possession of the party claiming under it, and the possession of the thing conveyed has followed the conveyance. Stockbridge *v.* West Stockbridge, 14 Mass. 257; Winston *v.* Guathmey, 8 B. Mon. (Ky.) 19; Crane *v.* Marshall, 16 Me. 27; Hall *v.* Gittings, 2 Har. & J. (Md.) 380; Green *v.* Chelsea, 24 Pick. (Mass.) 71; Jackson *v.* Blanshaw, 3 Johns. (N. Y.) 292; Troup *v.* Hurlbut, 10 Barb. (N. Y.) 354; Clark *v.* Wood, 34 N. H. 447; Zeigler *v.* Houtz, 1 Watts & S. (Pa.) 533; Duncan *v.* Beard, 2 Nott & M. (S. C.) 400.

Ancient documents, purporting to be a part of transactions, and not a mere narrative of them, are, under certain qualifications, which will be noticed, receivable as evidence that those transactions really occurred. And, in this sense, the documents may be called hearsay evidence of ancient possession. Such evidence is very commonly adduced in practice to corroborate modern use or possession. Thus, upon a question as to the right of a lord of a manor to hold certain land within the manor free from common, several counterparts of leases found among the muniments of the lord of the manor, from which it appeared that the land had been demised by the lord free from common, were held to be receivable in evidence.[1] In an action of trespass,[2] upon issue joined on a plea of justification by virtue of a prescriptive right of fishery appurtenant to a manor, old licenses on the court rolls, and leases granted by the lords of the manor, in consideration of certain rents, to fish in the *locus in quo*, were held to be receivable evidence. HEATH, J., in this case, observed that he could not distinguish the licenses from old leases, which were always received in evidence in favor of those claiming under the lessors. Rent rolls, where payments have been made, are good evidence to prove fee-

[1] Clarkson *v.* Woodhouse, 5 T. R. 413, n.; S. C., 3 Doug. 189. See also Barnes *v.* Mawson, 1 M. & S. 78, *supra;* Leathes *v.* Newit, 4 Price, 355; 8 Price, 562; Fisher *v.* Graves, 3 Eag. & Y. 1180. To show the practical location of a boundary line and acquiescence in it, between the town of Rochester and the Hardenburgh patent, a line some fifteen miles long, ancient deeds and agreements between parties interested in the line, and statements in the town records of Rochester, are competent evidence, if made *ante litem motam*. Under the same limitations, a survey of the line and an agreement to abide by it, adhered to for many years, though not legally binding upon the parties, are competent evidence to establish the line thus agreed upon. Hunt *v.* Johnson, 19 N. Y. 279.

The authority of an ancient deed is not established by producing it from the proper custody and showing it to have existed for even sixty years, unless it be also shown that possession has been taken or some unequivocal act done under it, or that its validity has been admitted by parties having an adverse interest. Wilson *v.* Betts, 4 Den. (N. Y.) 201. Thirty years' uninterrupted possession under a deed will entitle it to be read in evidence without proving its execution. Clark *v.* Owens, 18 N. Y. 434.

[2] Rogers *v.* Allen, 1 Camp. 309.

farm rents,[1] or for other purposes.[2] Old court rolls have been admitted to prove a prescriptive right to wreck in the lord of a manor.[3]

It has been questioned, however, whether ancient leases are proper evidence against strangers, of the boundary of the property conveyed. In Clarkson *v.* Woodhouse,[4] LORD MANSFIELD, C. J., said that the case before him differed from the case of Lord Pomfret *v.* Smith,[5] where Lord Pomfret offered a lease by himself or his predecessor, describing the premises in dispute as lying within the limits of Lord Pomfret's estate, the question being on the boundaries. But on reference to the report of that case, it would seem that no part of the lease, upon the admissibility of which the principal question arose, applied to the place in dispute, but only the words of an exception contained in it, and therefore it was contended that the lease, not containing a demise of the lands in question, was not evidence of an act of ownership, but only showed that the lands were excepted by a description injurious to the rights of a stranger, against whom that description was attempted to be used.

An old map of lands annexed to a deed seems to stand on the same footing as a description contained in the deed itself, and to be admissible in evidence where it is part of the act by which property is to be conveyed.[6] But where a map or survey is not connected with any act of ownership, it appears to be inadmissible evidence to prove the parcels of an

[1] Newburgh *v.* Newburgh, 12 Vin. Ab. T, b. 43.

[2] Woodnorth *v.* Cobham, 1 Eag. & Y. 802. In 12 Vin. Ab. A, b. 66, it is said, a rental is but weak evidence, unless payment is also proved, and not sufficient *per se;* and by Comyns, B., 12 Vin. Ab. 90, pl. 14, rentals without money received and paid upon them, are nothing. In Lancum *v.* Lovell, 6 C. & P. 441, an ancient counterpart of feoffment produced from corporation muniments was rejected, because no rent had been received in respect of the property.

[3] Biddulph *v.* Ather, 2 Wils. 23.

[4] 5 T. R. 413, n. Parochial descriptions in leases are evidence upon questions of public right, where reputation is admissible. Plaxton *v.* Dare, 10 B. & C. 17.

[5] 6 Bro. B. C. 440.

[6] Gilb. on Ev. (3d ed.) 78, citing Yeates *v.* Connop, Hil. Ass. 1702. See also 1 Stra. 95, n.; 4 N. & M. 302; 1 Lord Raym. 734; Hughes *v.* Lakin, 7 C. & P. 481; Wakeman *v.* West, 7 C. & P. 479; Jackson *v.* Marsh, 6 Cow. 281; Hathaway *v.* Power, 6 Hill, 453.

estate, at least so far as respects the principle of evidence under consideration.[1]

But the mere existence of a deed for more than thirty years, without any proof of accompanying possession, is not enough in any case to authorize it to be read in evidence as an ancient deed, without proof of its execution.[2]

[1] Anon., 1 Stra., 95; Bridgman *v.* Jennings, 1 Lord Raym. 734; B. N. P. 283; by Lord Kenyon, C. J., in Pollard *v.* Scott, Peake, 18. See Wakeman *v.* West, 7 C. & P. 479; Doe *v.* Seaton, 4 N. & M. 81; Donnison v. Elsley, 2 Eag. & Young, 1396, n.; 12 Vin. Ab. 90, pl. 12.

[2] Ridgeley *v.* Johnson, 11 Barb. (N. Y.) 527; Homer *v.* Cilley, 14 N. H. 85; Bank of Middlebury *v.* Rutland, 33 Vt. 414; Dishager *v.* Maitland, 12 Leigh (Va.), 524; Fairly *v.* Fairly, 38 Miss. 280; Guinor *v.* Cotton, 49 Tex. 101; Johnson *v.* Simmons, 50 Tex. 521; Middleton *v.* Mass, 2 N. & McCord (S. C.), 55; Blakeman *v.* Doughty, 40 N. J. L. 319. In Martin *v.* Rector, 24 Hun (N.Y.), 27, upon the trial of an action of ejectment, the plaintiff produced two leases sixty years old. A witness testified that the subscribing witnesses were dead, and that from an inspection of many similar leases he was familiar with their signatures, and believed them genuine; that the lessor was dead; that he had seen him write, and believed *his* signature genuine. It was held that in the absence of proof of possession under the leases, *or as to their custody*, they were not admissible. In Missouri, by statute, proof of the execution of a deed, where the record is thirty years old, is dispensed with, but it is held that this does not dispense with the necessity of proving the loss of the deed before *a copy* of the deed can be used. Crisper *v.* Hannavan, 72 Mo. 548. The principle which allows ancient deeds, under certain circumstances, to prove themselves, has no application to cases in which the deed does not appear upon its face to have been regularly made, and in form sufficient for the object for which it is set up. Reaume *v.* Chambers, 22 Mo. 36. Thus, where the deed of a married woman is not executed in conformity with the law in force at the date of its execution, so as to convey her estate, it will not become effective as an ancient deed, from lapse of time. Boyle *v.* Chambers, 32 Mo. 46. Ancient records, when accompanied by an admission that they come from the proper depository, are admissible in evidence without further proof of their authenticity. A copy of an ancient proprietary charter, duly recorded and certified in the book of records of the proprietary, is admissible in evidence. Little *v.* Downing, 37 N. H. 355. If an instrument offered in evidence as an ancient deed be proved to be thirty years old, it is not necessary to show that it came from the proper custody, and that possession has been had under it; and if such an instrument be admitted as an ancient deed, it is admitted as being formally executed by signing, sealing and delivering. Brown *v.* Wood, 6 Rich. (S. C.) Eq. 155. Where a party, without objection, produces upon trial a portion of an ancient plan, the other party is entitled to put in the whole of it, as well as of the record and the deeds of those under whom he claimed, made after the

But proof of possession under the deed, even for a short time, will be sufficient. Thus, where possession for five years was proved, it was held that the deed, being more than thirty years old, was admissible in evidence as an ancient deed.[1] So, where the grantee entered upon the land believed to have been conveyed, immediately after the date of a deed more than thirty years old, though he only then occupied it for a short time, and that the grantor, twenty years after the date, acknowledged that he executed it at its date, it was held sufficient evidence of its antiquity.[2] But the fact that there has been no possession under the instrument will not defeat the admissibility of the instrument, if its authenticity is otherwise established, or such facts are shown as raise a fair presumption of its genuineness.[3] Thus a lease more than thirty years old was allowed to be read in evidence as an ancient deed, without proof of its execution, although there was no direct proof of possession accompanying it, it being found among the title papers of the estate affected by it, and the facts and circumstances in reference to the property specified in it being such as to afford a reasonable ground to presume its genuineness.[4] In another case,[5] a lease which was offered in evidence as an ancient deed, corresponded with one admitted by the pleadings to have been executed thirty years before, except that it was executed by A. only, while the one admitted was by A. and B. It was proved that the defendant had for four years paid rent at the time appointed in the lease; that the lease had twice been shown to him by the landlord's agent, when he had inquired as to its terms. It was held that the lease was admissible in evidence without further proof of its authenticity. So the authenticity of an ancient instrument may be established by proving the handwriting of one of the attesting witnesses,[6] or by showing that the instrument has been preserved under

partition, and referring to it. Floyd *v.* Tewksbury, 129 Mass. 362.

[1] Wager *v.* Acton, 1 Rice (S. C.), 100; Namlin *v.* Burwell, 75 Va. 551.

[2] Nixon *v.* Porter, 34 Miss. 697.

[3] Hinde *v.* Vattier, 1 McLean (U. S.), 110; White *v.* Hutchings, 40 Ala. 253; Carroll *v.* Norwood, 1 H. & J. (Md.) 167.

[4] Hewlett *v.* Cock, 7 Wend. (N. Y.) 371.

[5] Clark *v.* Owens, 18 N. Y. 434.

[6] Carroll *v.* Norwood, 1 H. & J. (Md.) 167.

such circumstances as render it apparently authentic.[1] Thus an ancient book, kept among the records of a town, purporting to be the "selectmen's book of accounts with the treasury of the town," is admissible in evidence of the facts therein stated; and where the selectmen were at the same time assessors, an entry in such book of a credit, by an order in favor of the collector for a discount of a particular individual's taxes, was held to be evidence of an abatement of the tax of such individual.[2] So, in a New Hampshire case,[3] in order to show that a certain town meeting was held thirty-eight years ago, a copy of an original warrant for a town meeting in the year 1805 was produced, on which there was a seal. The town clerk, who found the original among the papers in his office, could not state that there was a seal on it when he found it, but he had recently lent it to the selectmen, and when they returned it to him there was a seal on it. The record did not show that it was sealed. Two of the signatures to it, of persons styling themselves selectmen, were proved to be genuine. The warrant was posted up, the meeting was held, and the record showed that an officer was elected and sworn. The clerk for the year 1805 was dead. It was held that from these facts, after the lapse of thirty-eight years, the jury might presume that the meeting was duly held.

Old maps, stating boundaries made by persons having knowledge of the facts, are admissible as to the true location of the jurisdictional limits of a municipal corporation;[4] and ancient deeds and plans are admissible to prove the location of a creek or arm of the sea, filled up since the deeds were executed and the plans were made.[5] On questions as to the territorial limits of a municipal jurisdiction, either public reputation or the declarations of deceased persons, made *ante litem motam*, are admissible.[6]

[1] Hinde *v.* Vattier, *ante;* King *v.* Little, 1 Cush. (Mass.) 436.

[2] Boston *v.* Weymouth, 4 Cush. (Mass.) 538.

[3] Peterboro *v.* Lancaster, 14 N. H. 382.

[4] McCall *v.* United States, 1 Dak. 320.

[5] Drury *v.* Midland R. R. Co., 127 Mass. 571.

[6] McCall *v.* United States, 1 Dak. 320.

The rule of evidence for ancient documents is, that *they must have the appearance of due antiquity and genuineness, and must be procured from the proper custody and be corroborated by such acts of the parties claiming under them, as correspond with their tenor.*[1] *The genuinness of these documents may generally be shown prima facie by proof that they came from the proper custody;* and as to what is the proper custody, must depend upon the circumstances of each case. "*Documents*," said TINDAL, C. J.,[2] "*found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it*, for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there would never be any question as to their authenticity; but *it is when documents are found in other than their proper place of deposit*, that the investigation commences whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree, some more so, some less; and in those cases the proposition to be determined is, *whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine.* That such is the character and description of the custody which is held sufficiently genuine to render a document admissible, appears from all the cases."[3] Thus, in

[1] Law *v.* Mumma, 43 Penn. St. 267.

[2] In Bishop of Meath *v.* The Marquis of Winchester, 3 Bing. N. C. 200; Williams *v.* Conger, 49 Tex. 582.

[3] Clark *v.* Courtney, 5 Pet. (U. S.) 319; Barr *v.* Gratz, 4 Wheat. (U. S.) 213; Winn *v.* Patterson, 9 Pet. (U. S.) 663; Duncan *v.* Beard, 2 Nott & McC. (S. C.) 400; Hewlett *v.* Cook, 7 Wend. (N. Y.) 371; Jackson *v.* Luguere, 5 Cow. (N. Y.) 221; Jackson *v.* Laraway, 3 John. Cas. (N. Y.) 283. In Brown *v.* Wood, 6 Rich. (S. C.) Eq. 155, it was held that if a deed offered in evidence is proved to be over thirty years old, it is not necessary to prove that it

an early New York case,[1] a book, purporting to contain the proceedings of the commissioners of forfeitures, but not proved to have ever been in their possession, though found in the clerk's office in 1806, and having lain there seventeen years, is not admissible to show a sale by the commissioners; and if shown to be genuine, it would not be evidence of title.

In a Massachusetts case,[2] in a writ of entry, upon the question whether the grantees of a cove, under whom the tenants derived their title, had ever claimed or taken possession of certain flats, the tenants were permitted to give in evidence an ancient deed, under which possession had been taken and continued to the present time, from such grantees to a third person, of a part of the flats; and an ancient record book, which, although not regularly authenticated, had been preserved among the records of the town, was held (there being nothing to impeach its verity) competent and sufficient evidence to establish the ancient titles under the allotments from the town. In the case of deeds, grants, etc., their custody would naturally be with the grantee or those claiming under him, and when so found, it is admissible.[3]

The question in all such cases is not necessarily whether it was found in the place where it would be most likely to have been found, but *whether its actual place of custody was one where it might reasonably be expected to be found*;[4] and the

came from the proper custody. But this is not the general rule. Jackson *v.* Miller, 6 Cow. (N. Y.) 751.

[1] Jackson *v.* Miller, *ante*.

[2] Rust *v.* Boston Mill Corporation, 6 Pick. (Mass.) 158.

[3] Bullen *v.* Michel, 2 Price, 413, Bishop of Meath *v.* Marquis of Winchester, 3 Bing. N. C. 201. Where lands of individuals are bounded on town lines, ancient maps of towns made by authority of the State, and perambulations of town lines, are competent evidence in suits between such individuals; and the records of a town, purporting to be made in 1728, and coming from the proper depository of such records, not attested by any clerk, and not accompanied by any notice of the town meeting, were held competent evidence to be submitted to a jury. Adams *v.* Stanyan, 24 N. H. 405.

[4] TINDAL, C. J., in Bishop of Meath *v.* Marquis of Winchester, 3 Bing. N. C. 201; Jones *v.* Waller, 2 Gwill. 346; Doe *v.* Pearce, 2 M. & Rob. 240; Rees *v.* Walters, 3 M. & W. 527; Doe *v.* Samples, 8 Ad. & El. 151; Trimlestown *v.* Kenns, 9 Cl. & F. 774; Bertis *v.* Beaumont, 2 Price, 397.

circumstance that an old lease is found in the possession of the lessor,[1] or a trust deed is found in the possession of the grantor,[2] or that an old will is found in the possession of one of the beneficiaries, when it should have been deposited in the Ecclesiastical Court,[3] has been held not sufficient to strip it of its value as evidence, as an ancient instrument. Mr. Phillips, in his work on Evidence,[4] insists that in order to render ancient documents admissible, proof, if possible, must be given of some *act done with reference to them.* But this does not seem to be the rule, "for," says Mr. Taylor,[5] "although it is perfectly true that the mere production of an ancient document, unless supported by some corroborative evidence of acting under it, or of modern possession, would be entitled to little, if any, weight, still there appears to be no strict rule of law which would authorize the judge in withdrawing the deed altogether from the consideration of the jury: — in other words, *the absence of proof of possession affects merely the weight, and not the admissibility, of the instrument.*" Thus, in Rogers *v.* Allen,[6] where, in order to prove a prescriptive right of fishery as appurtenant to a manor, ancient licenses to fish in the *locus in quo*, which appeared on the court rolls, and were granted by former lords in consideration of certain rents, were tendered in evidence, Mr. Justice Heath, after argument, held that they were admissible without any proof of the rents having been paid; but he added that, "to give them any *weight*, it must be shown that in latter times payments had been made under licenses of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in." So, in the case of the Duke of Bedford *v.* Lopes,[7] which was an action brought to try the title to the bed of a river, after proof of a grant from Henry VIII, two counterparts of leases were produced from the Duke's muniment room, comprehending the soil in question. No payment by a tenant was proved, nor any modern act

[1] Rees *v.* Walters, 3 M. & W. 527.
[2] Doe *v.* Samples, 8 Ad. & El. 151.
[3] Doe *v.* Pearce, 2 M. & Rob. 240.
[4] Phillips on Ev. 276.
[5] Taylor on Ev. 435.
[6] 1 Camp. 309, 311.
[7] Cited in argument, 3 Q. B. 623.

of ownership; but LORD DENMAN admitted the instruments as coming from the right custody, observing that there was no circumstance in the case which threw suspicion upon them, and that "the absence of other kinds of proof was mere matter of observation."[1] Again, in an action of ejectment brought by Lord Egremont, it became necessary to show that the land in question had been part of the estate of the lessor's ancestor, Sir William Wyndham; and in order to establish this fact, there was produced from the muniment room of the property which had descended from Sir William, what appeared to be a counterpart of a lease of this land, made by him; but it purported to be executed only by the lessee, and there was no proof given of actual possession under it. The Court of Queen's Bench, after consulting with some of the other judges, held that this deed was admissible in evidence.

Under the qualifications stated, *ancient documents, purporting to be a part of the transactions to which they relate, and not a mere narrative of them, are receivable as evidence that those transactions actually occurred.* And though they are spoken of as hearsay evidence of ancient possession, and as such are said to be admitted in exception to the general rule, yet they seem rather to be parts of the *res gestæ*, and therefore admissible as original evidence, on the principle already discussed. An ancient deed, by which is meant one more than thirty years old, having nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead; and, if it be found in the proper custody, and be corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof, it will be presumed to have constituted

[1] Doe *v.* Pullman, 3 Q. B. 622, 626. See further, on this subject, Clarkson *v.* Woodhouse, 5 T. R. 413, n., *per* LORD MANSFIELD; Brett *v.* Beales, M. & M. 418, *per* LORD TENTERDEN; Doe *v.* Passingham, 2 C. & P. 444, *per* BURROUGH, J.; Rancliffe *v.* Parkyns, 6 Dow, 202, *per* LORD ELDON; McKenire *v.* Fraser, 9 Ves. 5. And such also is the rule in this country. Jackson *v.* Laroway, 3 Johns. Cas. (N. Y.) 283, 287; Jackson *v.* Luquere, 5 Cow. (N. Y.) 221, 225; Jackson *v.* Lamb, 7 id. 431; Barr *v.* Gratz, 4 Wheat. (U. S.) 213, 221; Hewlett *v.* Cock, 7 Wend. (N. Y.) 371, 373, 374.

part of the actual transfer of property therein mentioned, because this is the usual course of such transactions. The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents, as the remainder of a statue may be made out from an existing torso, or a perfect skeleton from the fossil remains of a part.[1]

Sec. 100. Hearsay not Admissible as to Private Title.

The objection to receiving hearsay testimony upon matters of private right, applies with great force to those cases which are unsupported by any analogy to matters of public or general interest; as where the fact sought to be proved is not matter of prescription or of boundary. Thus, in an ejectment,[2] where the lessor of the plaintiff claimed the land as tenant in tail under a will, by which the testator gave his son an estate for life, and the defendant claimed as devisee of the son, the question was, whether the land in dispute was part of the entailed estate, or had been purchased by the son. Evidence of reputation that the land had belonged to Sir J. S., and had been purchased of him by the father, the first testator, was held to be clearly inadmissible. So evidence of reputation has been rejected upon a question as to the usage in electing a schoolmaster, as it related to a private right,[3] and upon a question whether the tenants of a particular copyhold estate had the right of cutting and selling wood,[4] or whether the lord of a manor had a prescriptive right to all wreck within the boundaries of the manor.[5] In The King *v.* Antrobus,[6] on the trial of an

[1] Taylor on Ev., § 463.

[2] Didsbury *v.* Thomas, 14 East, 323.

[3] Withnel *v.* Gartham, 1 Esp. 324.

[4] Blackett *v.* Lowes, 2 M. & S. 494, 500.

[5] Talbot *v.* Lewis, 1 C., M. & R. 495.

[6] 2 Ad. & El. 794. Hearsay is admissible in the case of a custom. *Per* MARSHALL, C. J., in Mima Queen *v.* Hepburn, 7 Cranch, 296. A custom or usage is a fact to be proved by testimony, by persons who are acquainted with the locality or business to which it relates. Putnam *v.* Tillotson, 13 Met. 517; Cope *v.* Dodd, 13 Penn. St. 33. A present custom of business manifestly must be proved by persons engaged in or acquainted with the business. Isolated instances will not establish it, Cope *v.* Dodd, *supra;* there must be a general concurrence of action. Knowles *v.* Dow, 2 Foster (N. H.), 387. The mode of proving

information against a sheriff of a county, for not executing a convict sentenced to death, it was held that a witness could not be asked whether he had heard that it was the custom for the sheriff to be exempt from performing, or for another person to perform the duty in that particular county, although it had been proved that such other officer had in fact always performed it within living memory. It was said that this was not a matter of public interest, the public not being interested in the question which officer was to perform the duty.

It has been said that in the case of the Bishop of Meath *v.* Lord Belfield,[1] in a *quare impedit* after the plaintiff had given in evidence an entry in the register of the diocese of the institution of one K. (in which entry there was a blank where the patron's name was usually inserted), parol evidence of the general reputation of the country was offered, that K. was in by the presentation of one under whom the defendant claimed; and, on a bill of exceptions, the evidence was adjudged to be admissible, on the ground that a presentation may be by parol, and that what commences by parol may be transmitted to posterity by parol; and that this creates a general reputation. But Lord Kenyon, C. J., adverting to this case,[2] said he admitted that a presentation might be by parol, and might be proved by parol — that is, by a witness who was present and heard it; but he denied that in such a case common reputation could be given in evidence. "If it can," he added, "why might not such evidence decide titles to estates, at least before the Statute of Frauds, when no written instrument was required to make a good feoffment of the greatest landed property in the kingdom?"

There appears to be a conflict of authority upon the question whether evidence of reputation is admissible as to the *liability* of the occupiers of certain land to repair a road,

its existence, and the number of witnesses necessary to be called, must depend upon the circumstances of the case. Vail & Adams *v.* Rice, 5 N. Y. 151, and upon the object for which it is sought to be proved.

[1] B. N. P. 295, cited by Buller, J., in R. *v.* Eriswell, 3 T. R. 719; S. C., reported 1 Wils. 215.

[2] In R. *v.* Eriswell, 3 T. R. 723. See also Tellard *v.* Shebbeare, 2 Wils. 366.

ratione tenuræ. In The King *v.* Cotton,[1] it seems to have been assumed that such evidence was admissible, although the particular evidence tendered was rejected upon another ground. But in the later case of The King *v.* Wavertree,[2] similar evidence was rejected. It was tendered on behalf of the defendants, but, as the verdict was returned in their favor, there was no opportunity of carrying the question any further. While such evidence would establish a *private* liability, it would, at the same time, disprove the liability of the *public*. It is not, therefore, a question of private liability *per se*, in which the public are not interested. And, as reputation is admissible equally to disprove a *public right* as to establish one,[3] so it would seem such evidence should be admissible to disprove a *public liability* in the same manner as to establish it. And there seems to be no good reason why reputation should not be as good evidence to establish a liability to repair a road, *ratione tenuræ*, as it is in the case of a bridge or a sea-wall.[4]

Hearsay is, in general, inadmissible to prove particular facts, *unless such facts have become matter of general reputation*. Thus, on a question of parochial modus, hearsay evidence that a particular person, since deceased, paid a certain sum in lieu of tithes, would not be admissible; but if the witness says he has heard from old inhabitants that so much per acre was always paid in lieu of tithes, or that it had always been the custom to make such payments, that will be good evidence, for it does not consist of hearsay of a particular fact, but comes within the general rule of evidence of reputation.[5] MacDonald, C. B., said in one case:[6] "The essence of reputation is, that if you prove a fact — as, for instance, payment of a sum of money — it must be accompanied with this, that it was so paid in consequence of a reputation. If evidence is confined to the fact of payment, it is inadmissi-

[1] 3 Camp. 444.

[2] 2 Mo. & R. 353.

[3] See Drinkwater *v.* Pater, 7 C. & P. 181.

[4] See R. *v.* Sutton, 8 Ad. & El. 516; R. *v.* Leigh, 10 Ad. & El. 398.

[5] Harwood *v.* Sims, 1 Wightw. 112, 169; Moseley *v.* Davies, 11 Price, 162; Garnons *v.* Bernard, 1 Anstr. 298; Deacle *v.* Hancock, 13 Price, 226; Wells *v.* Jesus College, Oxford, 7 C. & P. 284.

[6] In Harwood *v.* Sims, *ante*.

ble, unless the tradition that came with it was a reputation that it had always been the case."

But though hearsay of a custom to make certain payments is evidence, hearsay that certain lands were formerly given to the vicar in lieu of tithes is not admissible,[1] this being evidence of a particular fact, and being confined to a particular occasion. Again, though reputation is good evidence of the boundaries of a town, it is not admissible to prove that houses once stood where there are now none.[2]

Upon a question whether a part of Lincoln's Inn was part of the parish of St. Andrew, Holborn, an ancient book of antiquities, relating to the parish and collected by a churchwarden, was produced, and several entries were tendered in evidence concerning the repairs of pews and the glazing of windows. ABBOTT, C. J., refused to receive this as evidence of reputation, as it related only to particular facts.[3] But entries in an old parish book, in which the names of the surveyors of the highways were stated, have been admitted, upon the principle that it would be difficult to give other proof of persons being surveyors at the time in question.[4]

Where the question is, whether a road is public or private, the declaration of a deceased person as to a certain fact having been done (as the planting of a tree) for the purpose of showing the boundary of the road, has been held not admissible as evidence of reputation, or as a statement accompanying an act.[5] It might have been shown that a tree was planted on the spot, and that persons were accustomed to keep within the line pointed out by it; but a declaration that it was planted with a particular motive and object is not evidence,[6] and declarations by deceased persons that they

[1] Chatfield *v.* Fryer, 1 Price, 253. And see Leathes *v.* Newel, 4 Price, 355; 8 Price, 562; Crease *v.* Barrett, 1 C., M. & R. 919.

[2] Ireland *v.* Powell, Peake Ev. 14, cited in Chatfield *v.* Fryer, 1 Price, 256; and in R. *v.* Bliss, 7 Ad. & El. 555.

[3] Cooke *v.* Banks, 2 C. & P. 478.

[4] R. *v.* Pembridge (Inhab.), Car. & M. 157.

[5] R. *v.* Bliss, 7 Ad. & El. 550. In this country the declarations of a deceased person have been frequently admitted, on questions of boundary involving private rights, where the witness appeared to have had the means of knowledge, and no interest in making them. Smith *v.* Powers, 15 N. H. 546. See next section.

[6] R. *v.* Bliss, 7 Ad. & El. 550.

had seen repairs done upon the road will not be admissible upon such a question.[1]

Sec. 101. Perambulations.

Perambulations, although they consist of particular acts done (as the making of an ambit, digging turves, putting down posts, etc.), and though they give rise to much hearsay evidence, are, properly speaking, only the exercise of a right, and it is held to be usual and entirely consistent with principle to admit what old persons, since deceased, who accompanied the perambulations, were heard to say on such occasions respecting the boundaries. But there does not appear to be any authority for admitting hearsay of particular acts done, as conducive to the proof of boundary, even though it is delivered on the occasion of a perambulation. In Weeks *v.* Sparke,[2] Lord Ellenborough, C. J., observed, upon the subject of perambulations, that they are in the nature of hearsay evidence, not of particular acts done (as that such a turf was dug, or such a post put down in a particular spot,—for that would amount to evidence of ownership), but evidence of the ambit or survey of a particular place or parish, and of what the persons accompanying the survey have been heard to say and seen to do on such occasions. Le Blanc, J., observed, in the same case, that the evidence of perambulations might be considered in a certain degree as evidence of the exercise of a right, yet that it had been usual to go further, and admit the evidence of what old persons, since deceased, had been heard to say on those occasions. Entries in parish books, recording the fact that perambulations had taken a particular line, have been held inadmissible.[3]

Sec. 102. Old Documents.

Reputation respecting public rights may be shown by old deeds or other old documents, even though of a private nature, as well as by the oral declarations of deceased

[1] By Patteson, J., id. 552.
[2] 1 M. & S. 687, 689.
[3] Taylor *v.* Devey, 7 Ad. & El. 409. See next section.

individuals.[1] Thus, where the question was, whether certain land was in the parish of A., or in that of B., where the land was tithe-free, ancient leases granted by the ancestors of the plaintiff's landlord, describing the land as being in the parish of B., were held admissible as evidence of reputation, notwithstanding that such ancestor had a direct interest in describing the land to be situated in that parish.[2] In the case of Cambridge Tolls,[3] a composition deed between the corporation of Cambridge and the university, regulating the amount of payment of tolls, was received as evidence of reputation of the existence of the tolls. It appeared that the deed had not been exactly followed in practice; but it was held that this objection did not apply to its admissibility. So depositions in ancient suits have frequently been produced to prove reputation.[4]

Sec. 103. Manorial Documents.

A customary of a manor delivered down with the court rolls from steward to steward, and purporting to be *ex assensu omnium tenentium*, although not signed by any person, has been held to be good evidence to prove the course of descent within a manor.[5] So the presentment of a custom of a manor by the homage, entered on the rolls of the manor, is receivable.[6] So ancient answers of conventionary tenants of a manor, stating the rights of the lord of the manor, and made to interrogatories put to them by commissioners, but which interrogatories were lost, have been received in evidence.[7] A presentment in a manor court, setting forth

[1] This subject will receive further illustration in that part of the work which treats of documentary evidence.

[2] Plaxton *v.* Dare, 10 B. & C. 17. See also Arundell *v.* Falmouth, 2 M. & S. 443; Freeman *v.* Phillipps, 4 M. & S. 486; Coombs *v.* Coethier, 1 M. & M. 398; Barnes *v.* Mawson, 1 M. & S. 78; Anglesea *v.* Hatherton, 10 M. & W. 218; Bullen *v.* Michel, 4 Dow. 297; Clarkson *v.* Woodhouse, 5 T. R. 412, n.; S. C., 3 Doug. 189.

[3] Brett *v.* Beales, 1 M. & M. 416. See also Curzon *v.* Lomax, 5 Esp. 60.

[4] Freeman *v.* Phillipps, 4 M. & S. 493. And see the cases of the Settle and Leeds Mills, cited by Lord Ellenborough, C. J., id.

[5] Denn *v.* Spray, 1 T. R. 466.

[6] Roe *v.* Parker, 5 T. R. 26. See Lord Kenyon's remarks as to the credit due to such presentments. See also Arundell *v.* Falmouth, 2 M. & S. 441.

[7] Crease *v.* Barrett, 1 C., M. & R. 923. See Evans *v.* Taylor, 7 Ad. & El. 617.

the boundaries of a manor, has been adjudged to be admissible evidence of boundary, although a part of the document, but not connected with the subject of the particular boundary, appeared to have been cut off.[1]

In an action by a copyholder against a freeholder of the manor, for the disturbance of the plaintiff's right of common,[2] by reason of the defendant surcharging the common (the plaintiff setting up a restricted right), parchment writings produced on the part of the defendant from among the muniments of the manor, purporting to be signed by many persons, copyholders, and stating an unlimited right of common in the commoners (which had been found inconvenient, and they had therefore agreed to stock it in a restricted manner), were held admissible as evidence of reputation respecting the general right at that period, and in disproof that the restricted right originated in prescription; there being no evidence that the plaintiff's tenement had belonged to any of those who had signed the writings, so as to render them admissible against him on that ground.

Sec. 104. Maps.

Maps, stating the boundaries of manors or parishes, are held even in England to be admissible in evidence to prove such boundaries, *provided it appears that they had been made by persons having adequate knowledge.* In the English cases, however, where maps have been admitted, their admissibility has depended on the ground of their being public documents, or of their being in the nature of admissions. Where they relate merely to the boundaries of private property, there is no ground for receiving them, however ancient.[3] In a case where a parish had been indicted for the non-repair of a highway, in order to show that the highway was not within the parish, a map was produced which had been made, about thirty years before, by a surveyor from

[1] Evans *v.* Rees, 10 Ad. & El. 151. See also R. *v.* Leigh, 10 Ad. & El. 398, 400, 404, 411.

[2] Chapman *v.* Cowlan, 13 East, 10.

[3] With respect to private maps, see Doe d. Hughes *v.* Lakin, 7 C. & P. 481; Sir J. Bridgman *v.* Jennings, 1 Ld. Raym. 734; Donnison *v.* Elsley, 2 Eagle & Y. 1396, n.

information derived from an old parishioner, who had pointed out the boundaries to him; and ERSKINE, J., held that if proof were given of the informant's death, the map would be admissible as evidence of reputation, although it was produced from the chest of the parish that was indicted.

In an earlier case,[1] upon a question of highway, LORD KENYON, C. J., rejected the evidence of a copperplate map purporting to have been made by the direction of former church-wardens. But it is difficult to see how there could be any valid objection to the reception of such evidence.

In this country old maps made by public authority, shown to be correct, or the authenticity of which is admitted or acted upon, are admissible,[2] especially when made by an official surveyor and verified by the oath of the surveyor;[3] and this is the rule when they relate to private rights. Thus, in an action to recover for building done under a special contract, requiring the plaintiff to conform to specific plans, other plans, as well as maps and drawings, exhibiting the various parts of the building and premises on which the work was to be done, are admissible in evidence as introductory to testimony; and a question to a witness whether such a plan is correct, though leading, is still proper, as mere inducement.[4] So, in a suit between the owners of adjoining land, to establish the dividing line, both parties deriving their title from the same grantor, a map annexed to the deed of the premises to said grantor, and referred to in the deed, is sufficiently authenticated *quoad* the parties to the suit, and is admissible evidence.[5] Copies of old maps and plans of Philadelphia, in the office of the surveyor-general, and certified by him, and the list of first purchasers, with the advertisement annexed, and historical books

[1] Pollard *v.* Smith, Peake, 18.

[2] Johnston *v.* Jones, 1 Black (U. S.), 209; Stein *v.* Ashby, 24 Ala. 521; Thrall *v.* Smiley, 9 Cal. 529; Dunn *v.* Hays, 21 Me. 76; Wilder *v.* St. Paul, 12 Minn. 192; Jackson *v.* Vandyke, 1 N. J. L. (Coxe) 28; Jackson *v.* Frost, 5 Cow. (N. Y.) 346; Burnett *v.* Thompson, 13 Ired. (N. C.) L. 379.

[3] Gates *v.* Kieff, 7 Cal. 124; Smith *v.* Strong, 14 Pick. (Mass.) 128; Surgett *v.* Doe, 24 Miss. 118.

[4] Stuart *v.* Binsse, 10 Bosw. (N. Y.) 436.

[5] Crawford *v.* Loeper, 25 Barb. (N. Y.) 449.

generally, received as authentic, are admissible in evidence of remote transactions.[1] So maps and ancient surveys, *as well as reputation*, are evidence to elucidate and ascertain a boundary, but not to impeach official grants on public record, where control has been long exercised in conformity to the grants.[2] In the trial of actions involving the title to lands, plans of the premises may be shown to the jury, and taken by them to the jury-room, if proved to be correct so far as they go, although they may not make a fair representation of the case.[3]

Sec. 105. Verdicts, Etc.

On questions of immemorial customary rights, and on questions of public or general interest, verdicts, judgments and decrees in suits in which the same right was in litigation, are admissible in evidence, although the suits were between other parties.[4]

In the case of Reed *v.* Jackson,[5] where, in an action of trespass, issue was joined on a plea of public right of way, the plaintiff was allowed to give in evidence a verdict found in his favor against a different defendant, upon an issue joined as to the existence of the same right of way, LAWRENCE, J., saying: "Reputation would have been evidence of the right of way in question; *a fortiori* the finding of twelve men upon their oaths." It has been established by a long course of authorities[6] that verdicts as well as judgments and decrees are admissible as evidence of reputation. If not amounting to reputation itself, *they are as good evidence as reputation*.[7] And in all cases involving a general right, where reputation is evidence, a verdict or a judgment — although between other parties — is evidence, not, indeed, of any *specific fact existing at the time*, but as evidence of the most solemn kind of an adjudication of a

[1] Commonwealth *v.* Alburger, 1 Whart. (Pa.) 469.

[2] Penny Pot Landing *v.* Philadelphia, 16 Penn. St. 79.

[3] Wood *v.* Willard, 36 Vt. 82.

[4] See Brune *v.* Thompson, Car. & M. 34.

[5] 1 East, 356.

[6] See LORD DENMAN, C. J., in Evans *v.* Rees, 10 Ad. & El. 156.

[7] By LITTLEDALE, J., in Brisco *v.* Lomax, 8 Ad. & El. 211.

competent tribunal upon the state of facts, and the question of usage, at that time.[1]

In an early case,[2] where the question discussed was concerning the right of the city of London to take certain tolls upon malt brought to London by west-country barges, it was held that verdicts against certain owners of barges were admissible in evidence against other owners who were neither parties nor privies to the former records. Similar evidence has been received upon a question respecting the right of electing church-wardens.[3] And it does not affect the *admissibility* of such evidence, although it may diminish its weight, that a judgment has been suffered by default, and does not appear, though of recent date, to have been followed up by execution or the payment of damages, or even that the verdict has not been followed up by a judgment or decree.[4] Thus, in the case of Brisco *v.* Lomax,[5] on a question as to the boundary between the manors of A. and B., the finding of a jury under an ancient commission from the Duchy Court of Lancaster, for the purpose of determining the boundary between the manors of B. and C., on a petition of the owners of the two last-mentioned manors, representing that the boundary was uncertain, and that suits were likely to arise between them, was adjudged to be admissible evidence; it appearing that the three manors of A., B. and C. were so situated with reference to each other that the ascertaining of the boundaries between B. and C. would throw light upon the boundaries between A. and B., although the verdict of the jury did not appear to have been followed up by a decree or judgment. "For," as COLERIDGE, J., said, "on a question of manorial boundary between two owners, reputation is admissible; and verdicts are evidence, where reputation is admissible, between third parties. The neces-

[1] By LORD ABINGER, C. B., in Pim *v.* Curell, 6 M. & W. 266.

[2] City of London *v.* Clerke, Carth. 181. See also Cost *v.* Birkbeck, 1 Doug. 218; the case of the Manchester Mills, 1 Doug. 221, n.; Somerset *v.* France, 1 Str. 659; Clarkson *v.* Woodhouse, 5 T. R. 412; Travis *v.* Chaloner, 2 Eag. & Y.; Biddulph *v.* Ather, 2 Wils. 23.

[3] Berry *v.* Banner, Peake N. P. C. 157.

[4] Carnarvon (Earl of) *v.* Villebois, 13 M. & W. 313, 329, 332.

[5] 8 Ad. & El. 198.

sity of a decree or judgment to render the verdict admissible exists only where it is sought to bind the parties conclusively by the finding; but here the verdict is not offered as conclusive evidence, *but as evidence in the nature of reputation.*

Sec. 106. Judgments, Decrees and Orders.

In an action by the lord of a manor against a copyholder for trespassing on his free warren,[1] a judgment on a *quo warranto* brought against a former owner of the manor, wherein the then defendant pleaded, and the attorney-general confessed, a prescriptive title to the franchise of free warren as appurtenant to the manor, has been held to be evidence for the plaintiff in support of the right of free warren by prescription, as being the judgment of a competent court upon a matter of a public nature, which concerned the crown and the subject. So, on the trial of an issue whether the deputy oyster-masters of the city of London have an immemorial customary right, as claimed by them,[2] a decree of the Court of Exchequer, relative to the matter in issue, was held to be admissible in evidence, upon the same footing as a verdict is admissible on a question of custom. If the decree has a tendency to prove any fact material to the issue, it is admissible. So decrees and orders of other competent tribunals are admissible as evidence of reputation. Thus, orders of commissioners of sewers, requiring landowners to repair sea-walls, are evidence upon an issue as to the liability of a party to make such repairs; and if they are of ancient date, it will be presumed that they have been duly acted upon.[3] But a decree or order, to be admissible, must be final; mere interlocutory orders will not be evidence. Thus, in the case of Pim *v.* Curell and others,[4] in an action for the infringement of a right of ferry, ancient proceedings in the Court of Chancery of the duchy of Lancaster, containing orders made by the court in the matter of an information

[1] Carnarvon (Earl of) *v.* Villebois, 13 M. & W. 313, 331.

[2] Laybourne *v.* Crisp, 4 M. & W. 320, 327.

[3] R. *v.* Leigh, 10 Ad. & El. 398.

[4] 6 M. & W. 234, 266.

relating to the ferry, were offered in evidence on the part of the plaintiff, and received at the trial; but the Court of Exchequer adjudged the order to be inadmissible, inasmuch as it was a mere interlocutory order, and did not involve any judgment upon the facts or on the rights of the parties. But this rule as to the admissibility of verdicts and other judicial documents as evidence of reputation does not extend to awards, even in cases where the cause has been referred by an order of a judge at Nisi Prius, as the authority of an arbitrator is entirely derived from the consent of the parties to the reference, and the award is but the opinion of the arbitrator, formed upon the result of evidence laid before him, generally in private.[1] Nor will a verdict or other judicial document be receivable, unless it appear that the tribunal was acting under legal authority. Thus, upon a question respecting the jurisdiction of the Court of Sessions of the county of Chester,[2] an order and decree upon the subject by the Lord High Treasurer and certain other public functionaries of the kingdom (not forming any court known to the laws) was held inadmissible as evidence of reputation, because, as was said by LORD TENTERDEN, C. J., declarations are only evidence of reputation when made by those who have a personal knowledge of the fact; whereas, in the case in question, the persons acting as judges had no knowledge of the fact, except what was derived in the course of the proceeding.

Sec. 107. Grounds upon which these Rules are Founded.

The ground for receiving evidence of reputation upon matters of public and general interest is, that the statements should have been made by persons likely to possess a competent knowledge of the facts to which their statements relate. It has sometimes been thought that this qualification must necessarily be satisfied where the matter is of public interest, because, as LORD KENYON, C. J., in one case observed,[3] all mankind being interested therein, it is natural to

[1] Evans *v.* Rees, 10 Ad. & El. 151, 155. See also R. *v.* Cotton, 3 Camp. 444.

[2] Rogers *v.* Wood, 2 B. & Ad. 245.

[3] In Morewood *v.* Wood, 14 East, 329, n.

suppose that they may be conversant with the subject, and that they should discourse together about it, having all the same means of information. And Lord Ellenborough, C. J., has stated it to be the general understanding upon which the decisions of the courts have proceeded, "that upon questions of public right all are interested, and must be presumed conversant with them." [1] But in a later case,[2] the court observed that it was clear that hearsay evidence upon some subjects could not be received, *unless with a qualification that it came from persons who had a special interest to inquire;* that in cases of pedigree the line was clearly defined; and that in cases of rights or customs which are not, properly speaking, public, but of a general nature, and concern a multitude of persons, as questions with respect to boundaries and customs of particular districts, though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighborhood. Where the right is really public, as a claim of highway, in which all are interested, it is difficult to say that there ought to be any such limitation, and none seem to exist, as in a matter in which all are concerned, reputation from any one is receivable; but of course it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as by living in the neighborhood, or frequently using the road in dispute. In the case last cited, which related to a custom in which all were not interested, but only such as chose to become adventurers in mines within a certain district, it was said that hearsay *from persons wholly unconnected with the place in which the mines were found* would be of no value, and probably altogether inadmissible; but that the hearsay of persons under whose estates the minerals lay, with respect to which the custom existed, was admissible, because they were sufficiently connected with the subject, although not concerned in mining, nor receiving the dues of mines. In Rogers *v.* Wood,[3] a document, purporting to be a decree of

[1] In Weeks *v.* Sparke, 1 M. & S. 686.

[2] Crease *v.* Barrett, 1 C., M. & R. 927.

[3] 2 Bing. 86.

certain public functionaries, who had no authority as a court, was held to be inadmissible as evidence of reputation on a question whether the city of Chester, before it was made a county of itself, formed a part of the county palatine, because those persons from their situations had no peculiar knowledge of the fact. In another case[1] Le Blanc, J., laid great stress upon the circumstance that the evidence of reputation in that case *proceeded from persons who had been conversant with the neighborhood where the waste lay to which their statements referred;* and that no evidence was received, except from persons connected with the district then in question. But actual inhabitancy in the place of which the boundaries are in dispute is unnecessary. Thus, justices of the peace, at the sessions of the county within which the district was alleged to be, were considered, on account of the character and nature of their office, without proof of their being residents, to have sufficient connection with the subjects in dispute to render the statements in their orders, as to the location of Nottingham Castle, admissible evidence of reputation.[2] So, on a question of parochial or manorial boundary, the declarations of old persons, deceased, have been held admissible, although they were parishioners, and claimed rights of common on the wastes which their declarations had a tendency to enlarge.[3] So, on a question of parochial *modus*, it was held that the declarations of deceased parishioners and occupiers of lands in the parish who were liable to pay tithe were admissible.[4] In Crease *v.* Barrett,[5] certain answers of conventionary tenants were objected to as not being admissible against the freeholders of a manor, to whom it was said they had an adverse interest, and it was contended that all the cases in which the hearsay of copyholders had been received, related to questions between lord and copyholder, or copyholder and copyholder. The answers, however, were held to be admissible evidence.

[1] Weeks *v.* Sparke, 1 M. & S. 688, 689.

[2] New Castle *v.* Broxtowe, 4 B. & Ad. 273.

[3] Nicholls *v.* Parker, 14 East, 331, n.

[4] Harwood *v.* Sims, 1 Wightw. 12; Moseley *v.* Davies, 11 Price, 162, 180; Deacle *v.* Hancock, 13 Price, 226. See what is said by Graham, B., in 13 Price, 236.

[5] 1 C., M. & R. 927.

Sec. 108. Position of Parties Presumed to be as Stated in Ancient Documents.

Where proceedings in an ancient suit are produced as evidence of reputation upon matters of public or general interest, it may generally be presumed that the parties to the suit and the witnesses were actually in the respective capacities which they purported to have been, without proving this by evidence *dehors* the proceedings themselves.[1] Thus, in Freeman *v.* Phillipps,[2] an action by a copyholder against the lord of a manor, in which the defendant gave in evidence the proceedings in a suit in equity in the time of King William III, brought by a copyholder of the same manor against the then lord, it was held that no evidence *aliunde* was requisite to make the proceedings admissible. BAYLEY, J., said: "We must assume at this time of day that the bill was not a mere fabrication, but was really filed by such a copyholder against the lord, and that the trial was had and the depositions made between such parties as were really litigating their rights in the characters claimed and disclosed on the record." And with respect to the depositions the same judge observed: "These I do not look upon merely as the declarations of persons unconnected with the subject, but as the depositions of persons, made by them in the character of witnesses brought forward by the copyholder, whose interest it was to put foremost such witnesses as were best able to depose to the matter in dispute. Why am I to assume that the copyholder brought forward witnesses who were ignorant? I do not agree that it was necessary to prove the witnesses to have been copyholders, in order to let in their testimony. The plaintiff's witnesses in the last trial do not all appear to be copyholders, yet, as they were present at the holding of courts, and therefore knew what passed, they were competent to speak to that. So in the former suit I cannot infer that they were incompetent to have a

[1] A stricter rule has been laid down in some pedigree cases (the Banbury and Berkeley Peerage Cases), and the same point occurs in regard to declarations against interest. Davis *v.* Morgan, 1 C. & J. 591; Adamthwaite *v.* Synge, 1 Stark. R. 183, 189; S. C., 4 Camp. 372; Slane Peerage, 5 Cl. & Fin. 23.

[2] 4 M. & S. 495.

knowledge of the facts they deposed to; on the contrary, it is to be presumed they had a competent knowledge, being brought forward as witnesses by a copyholder." LORD ELLENBOROUGH, C. J., in the same case, observed: "Considering the depositions as made in a suit which may now be said to be lost in remote antiquity, we should give this record but very little effect, if we did not attribute to it verity in many of the particular matters which it contains, such as, that the parties litigant were clothed with the rights in which they profess to stand, and were agitating the claim put forward on the record."

Sec. 109. Proof of Modern Exercise of Right.

Another cautionary rule, in receiving hearsay evidence in matters of public or general interest, has been supposed to be, at least where the nature of the case admits of it, that a foundation for it should be laid by proving acts of modern enjoyment. LE BLANC, J., in speaking of the manner in which matters of this nature are to be proved, says:[1] "First they are to be proved by acts of enjoyment within the period of living memory; and when that foundation is laid, then, inasmuch as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons of what they have heard other persons of the same neighborhood, since deceased, say respecting the right." Again: "After a foundation is once laid for the right by proving acts of ownership, the evidence of reputation becomes admissible." And BULLER, J., in another case observed:[2] "Thus far I agree with LORD KENYON and MR. JUSTICE ASHURST, that in no case ought evidence of reputation to be received, except a foundation be laid, by other evidence, of the right." But this does not now seem to be the rule, and in a later case,[3] in answer to an observation that all evidence of reputation was inadmissible,

[1] In Weeks *v.* Sparke, 1 M. & S. 688.

[2] In Morewood *v.* Wood, 14 East, 330, n. And see Ratcliff *v.* Chapman, 4 Leon. 242, commented on in 5. T. R. 32. In White *v.* Lisle, 4 Madd. 214, the vice-chancellor said that evidence of reputation was only admitted in confirmation of actual enjoyment, and not against it.

[3] Crease *v.* Barrett, 1 C., M. & R. 927.

unless confirmed by proof of facts, it was said that such proof was not an essential condition of its reception, but *that it was only material as affecting the value of the evidence when received.*[1] Where the subject-matter of the question does not, from its nature, admit of acts of enjoyment, proof of reputation, though unaccompanied by evidence of acts done, is admissible. On a question respecting the custom of descent within a manor, it has been held that reputation is admissible, without showing any instances of its having been put in use;[2] for were it otherwise, if no instances were to happen within the memory of man, and the old court rolls were to be lost, the custom itself would be entirely destroyed.[3] And in one case, Lord Tenterden, C. J., intimated an opinion that the existence of a manor might be proved by reputation alone, without evidence of the exercise of any manorial rights.[4] It is not necessary that statements of opinion upon any subject by deceased persons should expressly appear to be founded upon reputation derived from others. Thus, on an issue whether or not certain land, in a district repairing its own roads, was a common highway, it has been held to be admissible evidence of reputation that the inhabitants held a public meeting to consider the question of repairing such way, and that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway, there being at the time no litigation on the subject.[5]

General hearsay, or, in other words, public reputation, is sometimes adduced as ancillary evidence in laying the foundation for presuming a public corporate grant. Thus, the defendant justified in trespass *de bonis*, etc., as collector, the taking of goods for parish taxes; and the Massachusetts provincial records having been burnt by two several fires, and no charter of incorporation being found among those

[1] There was, however, sufficient proof of enjoyment given in that case.

[2] Beebee *v.* Parker, 5 T. R. 26, 31; Foster *v.* Sisson, 12 East, 62.

[3] By Grose, J., 5 T. R. 32; Roe v. Jeffery, 2 M. & S. 92; Doe *v.* Mason, 3 Wils. 63.

[4] 2 Stark. R. 466. This was ruled also by Lord Kenyon, C. J., in Curzon *v.* Lomax, 5 Esp. 60.

[5] Barraclough *v.* Johnson, 8 Ad. & El. 99.

subsisting, the defendant was allowed to prove the incorporation of the parish by general reputation.[1] Another and very common sort of hearsay is general reputation to prove that a man holds a public office or employment. This is usually introduced in connection with evidence of such acts as the office or employment imputed presupposes his right or duty to perform. The extent to which this doctrine has been applied will be partially seen by consulting our prior and subsequent notes, with the text to which they refer. We there spoke of it, with reference to the degree of evidence, as primary or secondary. We shall here add some further instances, which, while they will tend to enlarge the illustration under that head, are intended more particularly to test the application and force of hearsay evidence. In Porter *v.* Luther,[2] the court held that public reputation was admissible to prove the defendant a deputy sheriff, which was part of his plea of justification; and they say: "It is a general rule to admit proof by reputation that a person acts as a general public officer or deputy." In pursuance of this rule, it was received, in connection with the defendant's acts, to show that he was overseer of a certain road district;[3] to show that persons claiming to be collectors of school districts were in fact such;[4] that a military officer acting as president of a court martial was in fact president;[5] that a person is a constable,[6] county commissioner,[7] a justice of the peace,[8] a collector,[9] or indeed to show that any person claiming to hold a certain office acted as such, and discharged the functions of the office.

[1] Dillingham *v.* Snow, 5 Mass. 547.

[2] 3 John. (N. Y.) 431.

[3] Dean *v.* Gridley, 10 Wend. (N. Y.) 254.

[4] Ring *v.* Groat, 7 Wend. (N. Y.) 341; McCoy *v.* Curtice, 9 id. 17.

[5] State *v.* Gregory, 2 Murph. (N. C.) 69.

[6] Adams *v.* Jackson, 2 Aik. (Vt.) 145.

[7] Keyser *v.* McKisson, 2 Rawle (Penn.), 139.

[8] Wilcox *v.* Smith, 5 Wend. (N. Y.) 23.

[9] Eldred *v.* Sexton, 5 Ohio, 215.

CHAPTER VIII.

HEARSAY TO ESTABLISH PRIVATE BOUNDARIES.

SECTION.
110. Admissible, when.
111. Declarations of Deceased Surveyors.
112. Of Persons shown to have been in a Situation to Know.
113. When Hearsay is not Admissible.
114. Declarations of Owners.

Sec. 110. Admissible, when.

In this country, the declarations of deceased persons who are shown to have been in a position to know the facts, are admissible to establish the boundaries of lands owned by private persons.[1]

This species of traditionary evidence has, as we have seen, always been admitted, both in this country and in England, to prove facts of a public or general nature, and in this country most of our courts have extended the rule, and admitted this species of evidence to prove the boundaries of lands between individuals; and the extension of the rule in this respect is justified by the same necessity which justifies the original rule. In Connecticut,[2] where the question in an action of ejectment was, whether a highway reserved in 1676 was laid out over certain meadow land, as the defendant claimed, or over the upland, as the plaintiff claimed, the plaintiff, in support of his claim, offered as witnesses several aged men, who testified that when young they heard old men, since dead, say that there was a traveled road for high-

[1] Boardman *v.* Reed, 6 Pet. (U. S.) 328; Ellicott *v.* Pearl, 1 McLean (U. S), 206; Wooster *v.* Butler, 13 Conn. 309; Howell *v.* Tilden, 1 Har. & M. (Md.) 84; Redding *v.* McCubbin, id. 368; St. Louis *v.* Risley, 40 Mo. 356; Adams *v.* Stangan, 24 N. H. 405; Dibble *v.* Rogers, 13 Wend. (N. Y.) 536; Nieman *v.* Ward, 1 Watts & S. (Penn.) 68; Spear *v.* Coate, 3 McCord (S. C.), 228; Blard *v.* Talbot, Cooke (Tenn.), 142; McCloud *v.* Mynatt, 2 Coldw. (Tenn.), 163; Wood *v.* Willard, 27 Vt. 377.

[2] Wooster *v.* Butler, 13 Conn. 309.

way over the upland, and the court held that this evidence was admissible.[1] In North Carolina,[2] in a case where it became necessary to show the location of the beginning corner, under the calls of the defendant's deed, the defendant proposed to show, by his own evidence, where such corner was, by the declarations of one Gaskins, who pointed out the corner to him, and who, at the time when the declarations were made, was a slave belonging to a person who was then in the possession of an adjoining tract of land as owner, both of whom, at the time of the trial, were dead. The testimony was rejected, but upon appeal the Supreme Court held that the evidence was clearly admissible.[3] A similar doctrine is held in Vermont,[4] New Hampshire,[5] Maryland,[6] Pennsylvania,[7] Tennessee,[8] South Carolina,[9] New York,[10] Massachusetts[11] and Texas.[12] But this class of evidence is only admissible *where the person making the declaration is shown to be dead*,[13] *and*

[1] Higley *v.* Bidwell, 9 Conn. 447; 1 Swift's Digest, 766; Porter *v.* Warner, 2 Root (Conn.), 22.

[2] Whitehurst *v.* Petiphur, 87 N. C. 179.

[3] See also, to the same effect, Harris *v.* Parnell, 1 Hayw. (N. C.) 349; Caldwell *v.* Neeley, 81 N. C. 114; Gervin *v.* Meredith, 2 Car. L. R. 439; Dobson *v.* Finley, 8 Jones (N. C.), 495.

[4] Wood *v.* Willard, 37 Vt. 377; Evarts *v.* Young, 52 id. 329; Putnam *v.* Fisher, 52 id. 191; Powers *v.* Silsby, 41 id. 288.

[5] Smith *v.* Powers, 15 N. H. 546; Wendell *v.* Abbott, 45 N. H. 349; Adams *v.* Stannard, 24 id. 405.

[6] Hall *v.* Gittings, 2 H. & J. (Md.) 112; Medley *v.* Williams, 7 G. & J. (Md.) 61.

[7] Bender *v.* Pitzer, 27 Penn. St. 333.

[8] McCloud *v.* Mynott, 2 Caldw. (Tenn.) 163.

[9] Shear *v.* Coate, 3 McCord (S. C.), 228.

[10] Dibble *v.* Rogers, 13 Wend. (N. Y.) 536.

[11] Bartlett *v.* Emerson, 7 Gray (Mass.), 174; Long *v.* Cotton, 116 Mass. 414.

[12] Coleman *v.* Smith, 55 Tex. 254.

[13] Wood *v.* Willard, 37 Vt. 372. See also the cases previously cited in this section. Blythe *v.* Sutherland, 3 McCord (S. C.), 258; Long *v.* Pellett, 1 H. & McH. (Md.) 53. And the fact that their whereabouts is unknown, or that they are out of the State, is not sufficient. Buchanan *v.* Moore, 10 S. & R. (Penn.) 275; Gervin *v.* Meredith, 2 N. C. L. R. 634. But there is a distinction in this respect between proving *general reputation* and particular declarations. In the former case, proof of the death of the person from whom the information was derived need not be proved, but in the latter it must be proved. In Smith *v.* Nowells, 2 Litt. (Ky.) 159, this distinction was illustrated by a matter relating to boundaries. In that case the plaintiff brought ejectment, and it appeared that the plaintiff and the defendant claimed under interfering grants from the same

is shown to have had actual knowledge of the lines or boundaries in question,[1] *and stood in such a relation to the property as to have no interest to misrepresent the fact,*[2] and in many of the States that *the declaration must have been made upon the ground,*[3] and, in Massachusetts, *that they must have been made by persons in the possession of adjoining land as owners.*[4] But in New Hampshire[5] it is held that the declarant need not have been upon the ground at the time when the declarations were made; and in North Carolina[6] that he need not even have been in view of the premises. In most of the States it is not necessary that the declarant should ever have been in possession of the land as owner or otherwise, but simply *that he should be shown to have been in such a situation in reference thereto as to have actual knowledge of the facts.*[7]

Sec. 111. Declarations of Deceased Surveyors.

And upon this ground the declaration of deceased surveyors, who have surveyed that or adjoining lines, or of *any* deceased persons who are shown to have been in a situation to know the facts, although they had no interest whatever

source — the plaintiff's being the oldest. The defendant read in evidence a patent of land to one B., older than that under which the plaintiff claimed; and to show that it covered a part of the land in controversy, asked a witness whether certain lines were, before the commencement of the action, generally reputed in the neighborhood to be the lines of B.'s survey. This was objected to, but admitted, and the court held that it was properly admitted, the court saying: "What any one, even a person who had been present at the making of the survey, *had been heard to say*, would no doubt be inadmissible, unless the *death* of such person was first proved; *but there is a difference between hearsay of particular and general reputation.* From the nature of the thing, an old boundary cannot in general be proved by direct and positive proof; and reputation is, therefore, from necessity, admissible."

[1] Wood *v.* Willard, *ante;* Powers *v.* Silsby, *ante.*

[2] Wood *v.* Willard, *ante;* Mason *v.* McCormick, 85 N. C. 226.

[3] Bender *v.* Pitzer, 27 Penn. St. 333; Daggett *v.* Shaw, 2 Met. (Mass.) 223.

[4] Bartlett *v.* Emerson, 7 Gray (Mass.), 174; Ware *v.* Brookhouse, 7 id. 454; Flagg *v.* Mason, 8 id. 556.

[5] Smith *v.* Forrest, 49 N. H. 230.

[6] Scaggin *v.* Dalrymple, 7 Jones (N. C.), 446.

[7] Wood *v.* Willard, *ante;* Smith *v.* Forrest, 49 N. H. 230; Great Falls Co. *v.* Worster, 15 id. 412.

in the establishment of the boundaries, are admitted as evidence.[1] In a South Carolina case,[2] the question was one of location, or boundaries between the parties, and arose in an action of *trespass to try titles*, which is equivalent to a real action at common law. The witness said: "I was well acquainted with the lines of Watt's tract, a short time after they were run, and derived my information from Burnet Crafton, the original surveyor who ran them. He showed them to me four or five weeks after he made the survey. He showed me a poplar station on the north side of the Oslondy river on Riley's line, which he said was a station for both tracts, viz., Watt's and Riley's. He then showed me a stake which he said was the north-western corner of Watt's tract, and about two feet from it a hickory bush or small tree, now a stump, which he said was the corner of Riley's land. I have lived within a mile of this land ever since, and am well acquainted with it. The said Crafton further told me that the line commencing at the fallen red oak and running west was made by him, and intended at first as a boundary; but when he came to the good flat land, Watt directed him to annul and discontinue it, which he did. He then went to Riley's corner, and placed a stake as a corner for Watt's tract, near the hickory stump aforesaid, and then ran a line so as to intersect the widow Criswell's line below." This testimony was rejected at the circuit, because the surveyor's death had not been proved; but on motion for a new trial, the court held it to be obviously admissible as secondary evidence; and the omission to provide proof of the death appearing to have been inadvertent, they granted a new trial, with a view that the formality might be supplied.

The foundation of this proof as to surveyors' declarations, and the qualifications and aspects under which it is to be received, had been examined in several cases before the decision in the case last referred to. Thus, in a Pennsylvania

[1] Miller *v.* Wood, Vt. S. C. 1868 (Conn.), 22; Blythe *v.* Sutherland, (Rutland Co.); Wood *v* Willard, 3 McCord (S. C.), 258.
ante; Porter *v.* Warner, 2 Root

[2] Blythe *v.* Sutherland, *ante*.

case,[1] in ejectment, it became material for the plaintiff to show a survey by A., pursuant to instructions, for C., under whom the plaintiff claimed; and the plaintiff offered to show that A., who was dead, and whose papers had been burnt, had declared that he had been instructed in writing to make the survey, and the place where. This was held inadmissible, as not being hearsay in respect to boundary, but in respect to the contents of a paper. In another case, the plaintiffs claimed to a certain extent, and according to W.'s survey. W. was dead, and to prove the extent of the survey, they offered in proof what he had said. This was received, and held well. TILGHMAN, C. J., said: "When boundary is in question, what has been said by a deceased person is received as evidence. It forms an exception to the general rule. It was impossible for the plaintiffs to show the extent of their possession without showing the lines run by W. Those lines were the plaintiffs' boundaries; at least such was their claim. It appears to me, therefore, that what was said by W. comes within the exception which admits the words of a deceased person to be given in evidence in a matter of boundary.[2] Again, in ejectment, the lessor of the plaintiff claimed a tract called D., in Arundel county (Maryland), according to certain lines, and was allowed to show that the surveyor appointed for that county had run the lines, and made certain declarations as to the boundaries and termination of the lines, in connection with declarations from other persons who were dead.[3] In another case the plaintiff claimed the *locus in quo* under a survey, etc., in 1785, and the defendant under a survey in 1763. On the trial the defendant offered to prove that in 1786, D., deceased, had shown a boundary line between the *locus in quo* and his, D.'s, tract; and had also shown a witness a walnut tree, as the common corner of three surveys, one for D., and another for S. and F. This testimony was admitted, and, on error, held well. TILGHMAN, C. J., said: "It is not denied that, in general, the declaration of a deceased

[1] Bonnett *v.* Devebaugh, 3 Bin. (Penn.) 175.

[2] Caufman *v.* The Presb. Congregation of Cedar Spring, 6 Bin. (Penn.) 59.

[3] Weem *v.* Disney, 4 H. & M'H. (Md.) 156.

person as to boundary is evidence; but it is said this declaration went to prove a survey. This objection is too refined. The substance of the evidence was, that D. showed the boundary; but this could not well be expressed without saying of what land it was the boundary. Undoubtedly, a boundary being shown, some implication would arise that a survey had been made; but this is unavoidable. It is no objection, however, to D.'s declarations. Those declarations are only in proof of a boundary; and if the jury thought the boundary established, the inference of a survey would be drawn directly from the fact of a boundary. The proving of a boundary is one thing, and the consequence of a boundary being proved another."[1] In trespass to try titles, the plaintiff claimed a gum tree as the true corner, and was allowed to prove that G., deceased, had said he was a chain carrier at the time of the original survey, and that the gum tree was the corner then made.[2] In ejectment, the defendant contended that the land in dispute lay within Granville's line, under which Granville he claimed; and to show this line, he was allowed to give in evidence various acts of the legislature pointing out Granville's lines as the boundaries of counties, from 1753 to 1759; and that, in 1772, the same line had been run out and marked by commissioners as Granville's line, and had ever since been the reputed line. And though it did not appear how this line was ascertained by the survey, and it was run merely to ascertain county lines, yet this evidence was held admissible. And HENDERSON, J., said the rule that common reputation was evidence in questions of boundary was here much better applied than when we permit a witness to swear that a person, since dead, told him that a certain tree in a remote wood was a line or a corner tree of some other person's land.[3]

Sec. 112. Of Persons shown to have been in a Situation to Know.

And so with regard to others: "It cannot be doubted at this day that the declarations of deceased persons, who shall

[1] Hamilton *v.* Menor, 2 S. & R. (Penn.) 70.

[2] Spear *v.* Coate, 3 McCord (S. C.), 227.

[3] Taylor *v.* Roe, 4 Hawks (S. C.), 116, 132. And see Harris *v.* Powell, 2 Hayw. (N. C.) 349.

appear to have been in a situation to possess the information, shall, on a question of boundary, be received in evidence." [1] And there are several cases exemplifying this proposition. In ejectment, the defendant produced a witness who deposed that eighteen years ago Charles Ridgely, deceased, told him that an agreement in respect to boundaries between two tracts of land, owned by T. and J. respectively, had been before entered into by them, giving particulars.[2] It not appearing that Ridgely was interested, held his declaration was admissible. In ejectment, the plaintiff's patent called for a white oak as the beginning. He proved a marked white oak; and that this was his place of beginning, he was allowed to prove the hearsay of a deceased person, who said he heard a former proprietor, now also dead, say that the white oak was the beginning tree; and also the hearsay of another, who said he ran out (surveyed) the land for the said proprietor when he purchased it, and began at the said white oak, in the year 1766.[3]

In the last case the court received what is called hearsay in the second degree. On similar evidence being received and acted upon at a trial in Tennessee, the Supreme Court of Errors and Appeals in that State had occasion to pass directly upon its admissibility. In ejectment (A. D. 1812), it became necessary for the defendant to show where Julius Sanders and others crossed Elk river in 1781, it being the place of beginning called for both in the entry and grant of the defendant. The defendant introduced Joseph Greer to prove what Alexander Greer told him had been said by Sanders on that subject, both Sanders and Alexander Greer being dead. The court allowed this, though it appeared that another witness, still alive, was present and heard what Sanders said. The court said: "We admit that every remove which is made from Julius Sanders renders the testimony weaker; but it is still competent. The object is to prove where Sanders crossed the Elk river. No doubt exists

[1] *Per* COLCOCK, J., in Spear *v.* Coate, 3 M'Cord (S. C.), 229.

[2] Hall *v.* Gittings, 2 H. & J. (Md.) 112, 121.

[3] Harris *v.* Powell, 2 Hayw. (N. C.) 349.

but what this may be done from evidence of what persons now dead have been heard to say. The same rule applies to all cases of pedigree, prescription or ancient landmarks. If Alexander Greer were living and present, it would be competent for him to prove what Sanders had said; and he being dead, Joseph Greer may be permitted to prove what Alexander Greer told him had been said by Sanders. It is equally competent, though weaker testimony. The reason why, in cases of pedigree, prescription and ancient boundary, the party may prove what persons, then dead, have been heard to say when living, is, that in such cases the party claiming the benefit of the evidence shall not be deprived of it by the death of the witness, if he can in any wise show what knowledge the witness had on the subject. What he has been heard to say, is pretty strong evidence of what he knew." The court admitted that perhaps the statement of the witness who heard Sanders would be more satisfactory; but it might be contended, with the same propriety, that evidence direct of what Sanders had said would not be admissible testimony, because other persons were along with him when he crossed Elk river, who are now living and capable of being produced.[1]

Sec. 113. When Hearsay is not Admissible.

But no oral evidence, much less hearsay, can be received to change the objects mentioned in a deed, entry or survey, or, in other words, to substitute one object for another. When corners in a deed are lost, they may be proved by reputation, but not to contradict the deed; as, where the deed sets up a sugar and ash tree as the south-east, and two beeches for the north-east corner, reputation is not admissible to substitute a hickory, oak and beech tree for the first, nor two hickories for the other.[2]

The admissibility and influence of hearsay and reputation, in respect to boundaries, was much considered by WASHINGTON, J., on a question which arose as to the extent of a tract

[1] Beard *v.* Talbot, 1 Cooke (Tenn.), 142.

[2] M'Coy *v.* Galloway, 3 Ohio, 282, 283.

of land called the manor of Springetsbury, in the State of Pennsylvania. William Penn, the patentee of the whole State (province) from Charles the First (in 1668), and his descendants, the proprietors, established and kept on foot a land-office, and issued regulations whereby settlers might, by locations and surveys, to be made according to the rules of the office, acquire equitable rights to conveyances of the lands so designated by them; the proprietors reserving a right to appropriate to themselves one-tenth of the State, by the like surveys. These regulations continued, and were recognized by the government as valid, from the time of the original grant down to 1776. Under them, in 1722, a survey was made by the government, and recognized by the proprietors of about 70,000 acres, reserved lands, under a warrant to surveyors, pointing out the precise metes and bounds of the tract. This tract was surveyed for the use of Springet Penn, one of the proprietors; but it did not appear whether the survey was made in fact on the land, by marks, designation or admeasurement, or whether it might not have been a mere paper survey, drawn out into a map from calculations made under the warrant. Afterwards, from this time to 1768, various contracts or licenses of sale, and warrants of survey, etc., were granted by the proprietors of this manor to settlers as within the manor; and others claimed to have located upon territorial lands without the manor; but the latter, as the proprietors claimed, had located, in truth, within the manor. There had been a re-survey by the proprietors in 1768, in consequence of the one in 1722 having been destroyed. This last comprehended all the settlers whose rights were in question in the suit. That of 1722 comprehended only a part. A bill in equity was filed by all those settlers against J. and W. Penn, the now legal proprietors, to compel a specific execution of the several contracts made by those under whom they claimed; and it became quite material, in respect to the different interests of the complainants, to ascertain the true bounds of the manor. It appeared most abundantly from the acts of the proprietors intermediate 1722 and 1768, such as licenses to take up, and grants of specified tracts of land, and a war-

rant for laying out a town, warrants to agree for land, and warrants to adjust differences among settlers, etc., that they all along supposed the manor to comprehend the lands covered by the last survey. A letter was received in evidence respecting the boundary, directed to one of the proprietors. The actual settlements and improvements made by licensed settlers within the manor, and the surveys and settlements made around and adjoining the different lines of the manor, were also in evidence. All these were intermediate the survey of 1722 and 1768; and they all had reference to, or accorded with, the boundaries in the last survey. These things together showed the putative boundaries of the manor to agree with the last survey as early as 1736, and from that time to 1814; and this, although, as JUDGE WASHINGTON expresses it, the two surveys varied extravagantly. He could find in the proof no intermediate survey to account for this; and he supposes that the locations, being made in such utter disregard of the first survey, might have arisen from the lines of that survey not being actually measured, but guessed at, or some of the courses only being run. On the subject of such surveys, followed by reputed and practical boundaries which conflicted with them, and the evidence receivable on this head, he proceeds: "No gentleman of the profession, who is at all conversant with land trials, can be ignorant that the courses and distances laid down in a survey, especially if it be ancient, are never in practice considered as conclusive; but, on the contrary, they are liable to be materially changed by oral proof, or other evidence tending to prove that the documentary lines are not those actually run. How often have we known reputed boundaries, proved by the testimony of aged witnesses, and even by hearsay evidence, established in opposition to the most precise calls of an ancient patent! Such evidence has been constantly received; and distances have been lengthened or shortened without the slightest regard to the call of the patent. The reason is obvious; it is not the lines reported, but the lines actually run by the surveyor, which vests in the patentee the area included within these lines. The survey returned, or the patent, is the evidence

of the former; natural marks of reputation is, in almost all cases, the evidence of the latter. The mistakes committed by surveyors and chain carriers, more particularly in an unsettled country and wilderness, have been so common, and are so generally acknowledged, as to have given rise to a principle of law, as well settled as any which enters into the land titles of this country, which is, that when the mistake is shown by satisfactory proof, courts of law, as well as courts of equity, have looked beyond the patent to correct it. It will readily be admitted that such evidence should be cautiously received, if it should have a preponderating influence in determining the question of boundary. Subsequent locators look, in the first instance, to the survey as made and returned, for a demarkation of the tract, with which they must not interfere. But if a mistake is apparent upon the face of the survey, taken in connection with the natural and artificial marks on the ground; if the reputation of the neighborhood has assigned to the tract of land so surveyed, boundaries different from those delineated on the survey returned, a subsequent location is so far affected by notice of the real boundaries of the tract on which it would adjoin, that a claimant under it cannot, even in a court of equity, set up his posterior equitable title against the legal or equitable title of the first locator. In short, he cannot assert that he was a purchaser without notice, in the face of strong evidence to the contrary." [1]

Sec. 114. Declarations of Owners.

Declarations by the *owners* of the land, *made against their pecuniary or proprietary interest*, are admissible,[2] provided they do not question a title which the declarant had no right to question,[3] and under this rule the declarations of one in possession of land, in disparagement of his own title, are

[1] Conn *v.* Penn, 1 Pet. (U. S.) C. C. 496.

[2] Putnam *v.* Fisher, 52 Vt. 191; Evarts *v.* Young, 52 id. 329; Smith *v.* Martin, 17 Conn. 399; Beers *v.* Hawley, 2 id. 467; Duning *v.* Carrington, 12 id. 1; Rogers *v.* Moore, 10 id. 13; Norton *v.* Pettibone, 7 id. 319; White *v.* Long, 24 Pick. (Mass.) 319.

[3] PARSONS, J., in Putnam *v.* Fisher, *ante*.

admissible in evidence against him and those claiming under him; but declarations in favor of his own title are inadmissible.[1] Thus, the declaration of a person made upon land, while he was in possession thereof under an undisputed claim of title, that his line extended to a certain boundary, which he pointed out at the time, is admissible in evidence, *after his decease*, in favor of those who claim under him, on the trial *of a question arising subsequently* concerning the boundary line of the same tract of land.[2] Declarations of persons in possession of property can only be given in evidence as part of the *res gestæ*, or in respect to their interest in the subject-matter,[3] and a party must be proved to have been in possession, before his declarations made at the time are admissible as part of the *res gestæ*, and as explanatory of the possession.[4] In an action of ejectment, the admissions of the person occupying the land are incompetent

[1] Osgood *v.* Coates, 1 Allen (Mass.), 77; Maxwell *v.* Harrison, 8 Ga. 61; Alden *v.* Gilmore, 13 Me. 178; Peabody *v.* Hewett, 52 Me. 33; Webster *v.* Saunders, 4 H. & J. (Md.) 287; West Cambridge *v.* Lexington, 2 Pick. (Mass.) 536; Church *v.* Burghardt, 8 id. 327; Niles *v.* Patch, 13 Gray (Mass.), 254; Hale *v.* Silloway, 1 Allen (Mass.), 21; Dow *v.* Jewell, 18 N. H. 340; Woods *v.* Blodgett, 18 N. H. 249; Spence *v.* Smith, id. 587; Bell *v.* Woodward, 46 N. H. 315; Waring *v.* Warren, 1 Johns. (N. Y.) 340; Jackson *v.* Bard, 4 id. 230; Jackson *v.* Shearman, 6 id. 19; Jackson *v.* Anderson, 4 Wend. (N. Y.) 474; Podgett *v.* Lawrence, 10 Paige (N. Y.), 170; Jackson *v.* Cole, 4 Cow. (N. Y.) 587; Pitts *v.* Wilder, 1 N. Y. 525; Gibney *v.* Marchay, 34 N. Y. 301; Burlingame *v.* Robbins, 21 Barb. (N. Y.) 327; Heister *v.* Laird, W. & S. (Penn.) 245; Sailor *v.* Hertzogg, 2 Penn. St. 182; Read *v.* Thompson, 5 id. 327; St. Clair *v.* Shale, 9 id. 252; Sample *v.* Robb, 16 id. 305; Alden *v.* Grove, 18 id. 377; Leger *v.* Doyle, 11 Rich. (S. C.) L. 109; Wallace *v.* Wilcox, 27 Tex. 60.

[2] Wood *v.* Foster, 8 Allen (Mass.), 24.

[3] Degraffenreid *v.* Thomas, 14 Ala. 681; Andrews *v.* Fleming, 2 Dall. 93; Bliss *v.* Winston, 1 Ala. 344; Nelson *v.* Iverson, 17 id. 216; Hadden *v.* Powell, id. 314; Perry *v.* Graham, 18 Ala. 822; Thompson *v.* Drake, 32 Ala. 99; Williams *v.* Ensign, 4 Conn. 456; Hillhouse *v.* Dunning, 7 Conn. 139; Dawson *v.* Callaway, 18 Ga. 573; West *v.* Price, 2 J. J. Marsh. (Ky.) 580; Young *v.* Adams, 14 B. Mon. (Ky.) 127; Marcy *v.* Stone, 8 Cush. (Mass.) 4; Hodgdon *v.* Shannon, 44 N. H. 572; Duffey *v.* Congregation, etc., 48 Penn. St. 46; Trotter *v.* Watson, 6 Humph. (Tenn.) 509.

[4] Ellis *v.* Janes, 10 Cal. 456; Thomas *v.* Degraffenreid, 17 Ala. 602; May *v.* Jones, 4 Litt. (Ky.) 21; Whiting *v.* Bacon, 9 Gray (Mass.), 206; Tomlin *v.* Den, 4 Harr. (Del.) 76; State *v.* Emory, 6 Jones (N. C.) L. 133; Reed *v.* Dickey, 1 Watts (Penn.), 152.

unless there can be some privity shown between him and the defendant; and even then are inadmissible if he can be personally called as a witness.[1] Where a tenant has made admissions or declarations as to the character and extent of his tenancy, they are admissible against him in a suit between him and his landlord in respect to the possession, no matter to whom they were made. It is not essential that such admissions, to be available, should be made to the landlord or his agent.[2] The declaration of a deceased tenant in common of land, that he had made a verbal division with his co-tenant, and subsequently that he had received from his co-tenant a deed of division, was held to be admissible in evidence against his heirs, in support of the presumption that he gave a corresponding deed to his co-tenant.[3] So declarations of an occupant of land, while in possession, that he was only a tenant of another, are competent evidence in favor of the latter against a third person, after the death of the occupant, but not before.[4]

Declarations made by an owner in his own favor are not admissible to show the location of a boundary, but are for the purposes of showing non-acquiescence in a different line or boundary.[5] The same rule as to *lis mota* prevails in reference

[1] Hanley *v.* Erskine, 19 Ill. 265.

[2] Secor *v.* Pestana, 37 Ill. 525; Hamilton *v.* Paine, 17 Me. 219; Williams *v.* Mayor, 6 H. & J. (Md.) 529.

[3] White *v.* Loring, 24 Pick. (Mass.) 319.

[4] Currier *v.* Gale, 14 Gray (Mass.), 504; Rand *v.* Dodge, 17 N. H. 343.

[5] In Young *v.* Evarts, *ante*, such declarations were admitted to show non-acquiescence, but not to prove the true line, the declarant being interested. The court said: "The plaintiff's testimony tended to show that he and his brother Anson and father Reuben, in 1831, procured a surveyor, Judge Beeman, to run the line—not on the line between the lots—so that there was an exchange of a small amount of land between them, and that the line thus run was acquiesced in by him and Anson Evarts until the death of Anson Evarts, in 1874, and was the line to which he claimed. This testimony was uncontradicted, except by the declarations of Anson Evarts, made within the last twelve or fifteen years, that the 'stone corner' was the corner of his land, and by a declaration of the plaintiff, made nineteen years before the trial, in regard to the location of the end of a wall built by him, running at right angles with the line. The declarations of Anson Evarts were allowed to be shown, against the exception of the plaintiff, and were allowed by the court to be used as tending to show where the line between them

to this class of declarations as prevails in reference to decla-

in fact was. In giving, or allowing to be given, to this evidence this scope and effect, we think the County Court erred. A party is not allowed to show his own declarations or the declarations of those through whom he claims title, in his own favor, unless such declarations accompany and give character to some act affecting his title, and so become a part of the *res gestæ*. This subject has frequently received the consideration of this court. In Wood *v.* Willard, 36 Vt. 82, it was held that the declaration of the grantor as to where his line was, made at the time he sold and conveyed the premises to the plaintiff, and while upon the premises pointing out the line, were not admissible. On the other hand, in Kimball *v.* Ladd, 42 Vt. 747; Noble *v.* Sylvester, id. 146; Perkins *v.* Blood, 36 id. 273, it is held that the declaration of a party or of a person through whom the party derives title, made while exercising a right or easement, and tending to show that he claimed to exercise it in his own right, or that he had not abandoned his prior possession or right to a piece of property, are admissible for such purpose only. Under this rule the declarations of Anson Evarts allowed to be shown were admissible to rebut the testimony of the plaintiff tending to show that at the several times when they were made, Anson Evarts was acquiescing in the line claimed by the plaintiff, and only for such purpose. They were not admissible for the purpose of showing where the Beeman line was, nor where the true line between him and the plaintiff then was; and on the question of acquiescence they should be confined strictly to the periods of time at which they were respectively made, and not be allowed as tending to show that he had not, from 1831 to the time of making such declarations, acquiesced in the line, as the plaintiff's testimony tended to show. Acquiescence is the state of a party's mind regarding a particular subject or thing, and his declarations on that subject or thing are the indices of his state of mind thereon at the times they are respectively made.

"These declarations, although Anson Evarts has deceased, do not fall within the rule established in Wood *v.* Willard, 37 Vt. 377; Powers *v.* Silsby, 41 id. 288, and some other more recent cases, allowing hearsay testimony, or declarations in regard to ancient boundaries between the estates of private individuals. The rule for the admission of such testimony, as expressed by PIERPOINT, C. J., in Wood *v.* Willard, *supra*, is, 'that the declarations of deceased persons who had actual knowledge as to the location of such boundaries, or who, from their connection with the property itself, or their situation and experience in regard to such boundaries and the surveys thereof, had particular means of knowledge, so that it may fairly be inferred that they had actual knowledge of the same, *made at a time when they had no interest to misrepresent*, * * * may be received as to the location of such boundary, when from lapse of time there can be no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject.' It is an important qualification that the declarant, at the time of making the declaration, should have no interest to misrepresent. Anson Evarts making a claim in his own favor was not thus disinterested. Whether the transaction in regard to the Beeman

rations relating to matters of general or public interest;

line was of such antiquity as to allow this class of testimony for the establishment of its location, is not admitted nor decided, as this testimony for this purpose is held inadmissible, on the ground that Anson Evarts, when he made the declarations, was interested in having the stone corner established as his corner."

The following is an abstract of a portion of Hunicutt *v.* Peyton, United States Supreme Court, February, 1881: A witness called to prove the location of private lands was allowed to testify that one M., a surveyor, had, while absent from the lands in question, told him the location and direction of certain boundary lines which M. said to witness he (M.) had surveyed, and witness was allowed to state what the declarations of M. were. Held error. Ellicott *v.* Pearl, 10 Pet. (U. S.) 412; Bartlett *v.* Emerson, 7 Gray (Mass.), 174; 5 Met. (Mass.) 223; Long *v.* Cotton, 116 Mass. 414; Bender *v.* Pierce, 27 Penn. St. 335. The conclusion to which a great majority of the decisions of State courts lead upon this subject is this: In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible, unless they were made by persons shown to have had knowledge of that whereof they spoke, or persons on the land, or in possession of it when the declarations were made. To be evidence, they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excludes hearsay evidence.

In Long *v.* Cotton, 116 Mass. 114, the court said: "The declarations of deceased persons respecting boundaries are received as evidence as an exception to the rule which rejects hearsay testimony. In most of the decided cases it is held that the declaration should appear to have been made in disparagement of title, or against the interest of the party making it; but in Daggett *v.* Shaw, 5 Met. 223, it is said that the rule as practiced in this commonwealth is not so restricted, and that declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, are admissible as evidence when nothing appears to show that they are interested to misrepresent, and it need not appear affirmatively that the declaration was made in restriction of or against their own rights. And in Bartlett v. Emerson, 7 Gray, 174, it is held that to be admissible, such declarations must have been made by persons now deceased, while in possession of land owned by them, and in the act of pointing out their boundaries, with respect to such boundaries, and when nothing appears to show an interest to deceive or misrepresent. Ware *v.* Brookhouse, 7 Gray (Mass.), 554; Flagg *v.* Mason, 8 id. 556.

"The declarations offered and rejected at the trial do not come within the exception thus defined to the rule by which hearsay is excluded. The decisive objection to their competency is that they do not appear to have been made while in the act of pointing out the boundaries of the declarant's land. This is an element which cannot be disregarded, especially when the question is one of private boundary. The declaration derives its force as evidence from the fact that it ac-

therefore reference is made to that chapter for the rules in that respect.

companies an act which it qualifies or gives character to. The declaration is then a part of the act. Without such accompanying act, the declaration is mere narrative, liable to be misunderstood or misapplied, and open to the objections which prevail against hearsay evidence.

"The declaration rejected does not appear to have been offered for the purpose of establishing a boundary by traditionary evidence or reputation. Such evidence has sometimes been said by American courts to be admissible; and in the cases from New Hampshire, cited by the defendant, it seems to be held that declarations of deceased persons, who, from their situation, appear to have the means of knowledge, and who have no interest to misrepresent the facts, are admissible to establish private boundaries, although not made on the land. Smith *v.* Forrest, 49 N. H. 230, 237; Great Falls Co. *v.* Worster, 15 id. 412, 437. But by the current of authority and upon the better reason, such evidence is inadmissible for the purpose of proving the boundary of a private estate, where such boundary is not identical with another of a public or *quasi* public nature. 1 Greenl. Ev. § 145; 1 Phil. Ev. (N. Y. ed. 1849), 241, 242; Cowen & Hill's Notes; Hall *v.* Mayo, 97 Mass. 416."

CHAPTER IX.

DYING DECLARATIONS.

SECTION.

115. When Admissible.
116. To what Matters Admissible.
117. Declarations must be Complete.
118. Considerations which should Control as to Admission of.

Sec. 115. When Admissible.

Another exception to the rule excluding hearsay evidence, which, however, is of more importance in criminal, than in civil cases, is made in favor of the declarations of a deceased person, made *in extremis*, as to the cause of his death and the person who inflicted the fatal wound; in criminal cases only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations, and never, under any circumstances, in civil cases;[1] and this rule is held not to impugn the constitutional right of the accused to be confronted by the witnesses against him, as the constitution does not alter the rules of evidence, but leaves it to the law to determine what a witness, when

[1] State *v.* Quick, 15 Rich. (S. C.) 342; Thompson *v.* State, 24 Ga. 297; People *v.* Vernon, 35 Cal. 49; State *v.* Reed, 5 Phila. (Penn.) 528; State *v.* Brunetto, 13 La. An. 45; State *v.* Nash, 7 Iowa, 347; Wulston *v.* Com., 16 B. Mon. (Ky.) 15; McDaniel *v.* State, 16 Miss. 401; Com. *v.* Casey, 11 Cush. (Mass.) 417; Burrell *v.* State, 18 Tex. 713; State *v.* Pall, 1 Hawks (N. C.), 442; Nelson *v.* State, 7 Humph. (Tenn.) 542; Moore *v.* State, 12 Ala. 764; Robbins *v.* State, 8 Ohio St. 131; Bull's Case, 14 Gratt. (Va.) 613; State *v.* Center, 35 Vt. 378; People *v.* Knickerbocker, 1 Parker Cr. (N. Y.) 302; State *v.* Arnold, 13 Ired. (N. C.) L. 184; State *v.* Thawley, 4 Har. (Del.) 562; Dunn *v.* State, 2 Ark. 229; Goodall *v.* State, 1 Oregon, 333; Cone *v.* Cooper, 5 Allen (Mass.), 495. The dying declarations of a person fatally injured by the negligence of another, as to the facts attending the injury, are not admissible against such person in a civil action brought to recover damages for the injury. Daily *v.* N. Y., &c., R. R. Co., 32 Conn. 356. See also Wilson *v.* Boerem, 15 John. (N. Y.) 286; R. *v.* Mead, 2 B. & C. 608; 1 East's P. C. 353; Waldele *v.* N. Y. Central R. R. Co., 61 How. Pr. (N. Y.) 350.

confronted, shall be allowed to state as evidence.[1] But in order to make such declarations admissible, they must have been made *while the deceased was actually in danger of death, and under the settled conviction that he was about to die, and that death did actually ensue*,[2] and the question as to whether these elements existed is to be determined in view of all the circumstances, as the nature of the wound, the declarations of the deceased in that regard, and the sense of impending death incident to his condition.[3] Thus, in an Alabama case,[4] the deceased was poisoned on Sunday, and from that time until Tuesday evening, when she died, suffered severely from a burning pain in her stomach and bowels. On Sunday night, on Monday, and on Tuesday, just before she made a declaration, she used such expressions as, "I cannot stay here, I must go—good people, I am gone," and her medical attendant considered her *in extremis* from Tuesday morning until she died. Between nine o'clock A. M. and noon on Tuesday she asked her medical attendant if he could help her, to which he replied, he thought he could. It was held that the inquiry and reply, taken in connection with such strong evidences

[1] Walston *v.* Commonwealth, 16 B. Mon. (Ky.) 15; Campbell *v.* State, 11 Ga. 353; State *v.* Price, 6 La. Ann. 691; Commonwealth *v.* Carey, 12 Cush. (Mass.) 246; Burrell *v.* State, 18 Tex. 713; People *v.* Glenn, 10 Cal. 32; State *v.* Nash, 7 Iowa, 347; Woodsides *v.* State, 3 Miss. 655.

[2] United States *v.* Woods, Cranch (U. S. C. C.) 484; United States *v.* Veitch, 1 id. 115; Dunn *v.* State, 2 Pick. (Mass.) 229; People *v.* Lee, 17 Cal. 76; People *v.* Ybana, id. 166; People *v.* Sanchez, 24 Cal. 17; Walston *v.* Commonwealth, 16 B. Mon. (Ky.) 15; Brown *v.* State, 32 Miss. 433; People *v.* Knickerbocker, 1 Park. (N. Y.) Cr. 302; Montgomery *v.* State, 11 Ohio, 424; Robbins *v.* State, 8 Ohio St. 131; Brakefield *v.* State, 1 Sneed (Tenn.), 215; Nelson *v.* State, 7 Humph. (Tenn.) 542; Lewis *v.* State, 17 Miss. 115; Smith *v.* State, 9 Humph. (Tenn.) 9; Logan *v.* State, id. 24; State *v.* Center, 35 Vt. 378; Bull's Case, 14 Gratt. (Va.) 613. LORD DENMAN, in the Sussex Peerage Case, 11 Cl. & F. 108, laid down the rule as follows: "With regard to declarations made by persons *in extremis*, supposing all necessary matters concurred, such as actual danger, death following it and a full apprehension, at the time, of the danger and of death, such declarations can be received in evidence, *and all these things must concur* to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is subject to re-cross-examination."

[3] Sullivan *v.* Cone, 93 Penn. St. 284.

[4] Johnson *v.* State, 17 Ala. 618.

of a sense of impending death, did not prove anything beyond the hope of present ease or relief, and were insufficient to exclude the declaration of the deceased. In another case,[1] on the day on which the mortal blow was given, the witness said to the deceased that his deposition ought to be taken, as, in the opinion of the witness, he must inevitably die before morning. The deceased replied that he thought so too, and afterwards exclaimed, "O Lord, I shall die soon!" His declarations were reduced to writing, read over to him twice, and signed by him. On the evening previous his physician had held out to him some hopes of recovery, but told him his chance was bad. The deceased lived, however, some ten days after. It was held that his declarations were admissible as dying declarations. In a North Carolina case,[2] the deceased was cut with a knife into the coats of his stomach, was very weak from the loss of blood, and said that he must die, and did die, two days afterwards, of the wound he had received. It was held that his account, in a conversation of short duration, as to the manner in which the conflict began and was continued between him and the prisoner, was admissible as dying declarations, although the witness could not say whether the opinion expressed by the deceased that he must die was before or after the narration of the facts, there being no evidence that during the time of this short conversation the condition of the deceased was materially changed. It is not necessary that the declarations should have been made in words by the deceased; it is sufficient if they are made by signs in response to inquiries put by a person present, and the jury will give such weight thereto as they deem them entitled to in view of all the circumstances. This is well illustrated by a Massachusetts case.[3] In that case, T., being at the point of death, and conscious of her condition, but unable to speak articulately, in consequence of wounds inflicted upon her head, was asked whether it was C. who inflicted the wounds, and, if so, she was requested to squeeze the hand of the person asking the question.

[1] McDaniel *v.* State, 16 Miss. 401.
[2] State *v.* Pearce, 1 Jones (N. C.) 417.
[3] Com. *v.* Casey, 11 Cush. (Mass.)

Thereupon she squeezed the hand of the person making the inquiry. It was held that under all the circumstances of the case there was proper evidence against C. for the consideration of the jury, they being the sole judges of its credibility, and of the effect to be given to it. But declarations so made are not admissible,[1] unless it clearly appears that the deceased understood the inquiries clearly as well as the nature of his responses thereto. In the case last cited, an attorney, being present on the night when one who had witnessed a murder was dying, propounded questions to him which he tried to answer, but could not, and his attendant friends then "explained the questions to him, and made the answers, to which he assented only by nodding his head." The statement consisting of the answers thus made was, when finished, "read over to him by the attorney slowly and distinctly, and he signified his assent thereto by nodding his head;" "he spoke but a few words afterwards, and had frequently to be aroused; and seemed, while the statement was being read to him, to be in a stupor." It was held that this was not admissible evidence. Nor are such declarations admissible if the deceased entertained *any, even slight*, hopes of recovery.[2] Thus, in the case last cited, forty-eight hours after the shooting, the deceased clearly thought that he could not recover, and acted as if he was not to live but a short time, though the surgeons, to soothe him, assured him that he would live, and one of them thought he did entertain some hopes of his recovery, and it rather appeared that he did entertain some hopes. His declarations were not admitted.[3] In a California case[4] the court recognized this rule and applied it in a case where, in her dying statement, the deceased said: "Believing I am very near death, and realizing that *I may not recover*, etc." From this expression the court held that it was clear that the deceased entertained *slight* hopes of recovery, and, although she in fact died within an hour after making the statement, rejected it. "If it shall appear," said Ross, J., using the language of the court in a

[1] McHugh *v.* State, 31 Ala. 318.
[2] State *v.* Nash, 7 Iowa, 287.
[3] People *v.* Robinson, 2 Parker's Cr. Rep. (N. Y.) 235.
[4] People *v.* Hodgdon, 55 Cal. 72.

previous case,[1] "in any mode, *that there was a hope of recovery, however faint it may have been*, still lingering in his breast, * * his statement cannot be received."[2] But the fact that the deceased does not state in his declaration that he makes it in immediate expectation of death, does not affect its admissibility, if it contains nothing to show that he entertained any hope of recovery, and it reasonably appears that he did not entertain any such hope.[3]

Sec. 116. To what Matters Admissible.

Another important qualification of the rule is to be borne in mind, and that is, *that such declarations are only admissible as to matters about which the deceased would have been competent to testify, if sworn to in the cause*, and, consequently, such declarations should relate to *facts*, and not to the *opinion or belief* of the deceased.[4] But the fact that the examination was not conducted in the manner in which it would have been conducted in court does not affect the admissibility of the statement, but may affect its credibility.[5]

Sec. 117. Declaration must be complete.

Another important qualification to the rule is, that *the declaration must be complete* in itself, and if it appears that the deceased intended to qualify his statement, but was prevented from doing so from any cause, it will not be admissible.[6] When the declaration has been committed to

[1] People *v.* Sanchez, 24 Cal. 24.

[2] State *v.* Wilson, 24 Kan. 189.

[3] State *v.* Wilson, 24 Kan. 189; 36 Am. Rep. 257. And in this case such declarations were held admissible, although the deceased had previously given his testimony upon the preliminary examination of the respondent. Dumas *v.* State, 62 Ga. 58.

[4] McPherson *v.* State, 22 Ga. 478; Whitley *v.* State, 38 Ga. 50; R. *v.* Sellars, Car., C. & L. 233. In Merrill *v.* State, 58 Miss. 65, it was held that the portion of a declaration of a deceased person which related to *threats* made by the respondent *two weeks* before the injury was inflicted, was not admissible, but the remainder of such declarations are admissible if otherwise not objectionable. Jones *v.* State, 71 Ind. 66; Brotherton *v.* People, 75 N. Y. 139. In State *v.* Wood, 53 Vt. 560, to a question, "Had she threatened to injure you before?" the deceased responded, "Yes, she had threatened a thousand times to kill me, before," and such statement was held inadmissible.

[5] Com. *v.* Vass, 3 Leigh (Va.), 786; Rex *v.* Fagent, 7 C. & P. 238.

[6] Com. *v.* Vass, *ante*.

writing at the time it was made, it must be produced or accounted for, and neither a copy nor parol evidence can in the first instance be admitted to supply the omission.[1] But where several declarations were made, only one of which has been committed to writing, all may be proved ;[2] and if the deposition of the deceased has been taken under the statute, but for any cause is inadmissible as such, it is still, if made *in extremis*, admissible as a dying declaration.[3] Such declarations are admissible as well for as against the respondent.[4] But in Illinois [5] it is held that such declarations, not a part of the *res gestæ*, are not admissible in exculpation of the accused ; but such a doctrine would be very unjust,[6] and it is believed that the Illinois cases cannot really be said to go further than to hold what has already been stated to be the rule, that such declarations are not admissible when they relate to opinions rather than facts, as was the case in both of the cases cited from that State.

Sec. 118. Considerations which should Control as to Admission of.

It is the universal judgment of the courts, text-writers, and all thinking men, that this class of evidence is to be received with great caution, and, except where the circumstances were such as to render it next to impossible that the deceased could be mistaken as to the criminating facts stated, juries should scan the statement with great care, especially where there is evidence tending to show that the deceased was mistaken, for it is to be remembered that while the deceased made the statement under the apprehension of certain death, yet the respondent has not had the privilege of cross-examining the witness, or testing the real foundation of the deceased's belief as to his guilt, and that where the witness has not a deep sense of accountability to his Maker, and an enlightened conscience, the passion of anger, and feelings of revenge, or, in the case of mutual conflict, the

[1] Taylor on Ev. § 506.

[2] Kirby *v.* State, 8 Tex. App. 1.

[3] Rex *v.* Woodcock, 1 Lea. C. C. 502.

[4] Rex *v.* Scaife, 2 Lewis C. C. 150; People *v.* Knapp, 26 Mich. 112; Moore *v.* State, 12 Ala. 274.

[5] Maeck *v.* People, 100 Ill. 242; Adams *v.* People, 47 id. 376.

[6] People *v.* Knapp, *ante*.

natural desire of screening his own misconduct, may affect the truth and accuracy of his statements, and give a color to the transaction which, had further investigation been attainable, might have been proved to be incorrect. Moreover, the particulars of the violence to which the deceased has spoken are likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.[1]

[1] Jackson *v.* Kniffen, 2 John. (N. Y.) 35, 36, *per* LIVINGSTON, J.; R. *v.* Ashton, 2 Lew. C. C. 147, *per* ALDERSON, B. See also MR. EVANS' observations on the great caution to be observed in the use of this kind of evidence, in 2 Poth. Obl. 255 (293); 2 St. Ev. 367, and 1 Ph. Ev. 292.

CHAPTER X.

DECLARATIONS BY DECEASED PERSONS AGAINST INTEREST.

SECTION.

119. General Rule.
120 Kinds of Declarations Admissible.
121. Conditions Precedent to the Admission of.
122. Entries in Private Books.
123. Exceptions to the Rule.
124. Illustration of the Application of the Exception.
125. Person making, must be dead.
126. May be used as Evidence of Collateral and Independent Matters, when.
127. Similarity of Rule as to Entries made by Person in Office, and by Deceased Person.
128. Where Entries are made by Agents in due Course of Business.

Sec. 119. General Rule.

An exception is also made to the rule in reference to the admissibility of hearsay evidence *in favor of declarations and entries made by deceased persons against their proprietary or pecuniary interest*, unless it can be shown that they were made with a sinister motive.[1] This exception is founded upon the presumption that, where declarations are made under these circumstances, they are entitled to credit, because it is supposed that a person's regard for his own interest is such as to operate as a guaranty against his prejudicing himself by any erroneous statement, and that he would not be likely *fraudulently* to make a statement which would be prejudicial thereto.[2]

[1] Taylor on Ev. § 464; Short *v.* Lee, 2 Jac. & W. 464; Higham *v.* Ridgway, 10 East, 109; Sussex Peerage Case, 11 Cl. & F. 103; St. Clair's Heirs *v.* Shale, 20 Penn. St. 105; Highley *v.* Bidwell, 9 Conn. 447; Pike *v.* Hays, 14 N. H. 19; Smith *v.* Powers, 15 id. 546; Pearce *v.* Jenkins, 10 Ired. (N. C.) 355; Thomas *v.* Degraffenreid, 17 Ala. 602; Smith *v.* Maine, 25 Barb. (N. Y.) 33; Harris *v.* Clark, 3 N. Y. 93; Toat *v.* Finch, 1 Taunt. 141; White *v.* Chonteau, 10 Barb. (N. Y.) 202; Middleton *v.* Melton, 10 B. & C. 317; Reece *v.* Robinson, 15 East, 34.

[2] Phillips on Ev. 304.

Sec. 120. Kinds of Declarations Admitted.

Verbal declarations as well as written are admissible when they are clearly against the interest of the declarant, although, as a matter of course, they are entitled to less weight than those which are in writing, because they are made with less deliberation and are more liable to be erroneously remembered.[1] In a North Carolina case[2] it was held that the declarations of a deceased person against his interest, such as a verbal statement that he was at a given time indebted to another, were held admissible, and in the cases cited in the previous note, such verbal declarations were admitted without objections. In an English case[3] the question as to the admissibility of such evidence was much discussed, but was not decided; but in many cases in our courts such verbal declarations, where clearly against the interest of the declarant, have been admitted,[4] and, subject to the qualifications before stated, there would seem to be no good ground of objection thereto.

Sec. 121. Conditions Precedent to the Admission of such Evidence.

In order to render declarations against interest admissible — except in suits to which the declarant is a party — *it must first be shown that he is dead;*[5] and the exception does not

[1] Pearce *v.* Jackson, 10 Ired. (N. C.) 355; Ivat *v.* Finch, *ante;* Sussex Peerage Case, *ante;* Davies *v.* Pierce, 2 T. R. 53; Strode *v.* Winchester, 1 Dick. 397; Hallaway *v.* Rakes, cited 2 T. R. 55.

[2] Pearce *v.* Jackson, *ante.*

[3] Furdson *v.* Cloggett, 10 M. & W. 572.

[4] Arthur *v.* Gale, 38 Ala. 259; Kneeland *v.* Wilson, 12 Cal. 241; Bollo *v.* Navarro, 33 Cal. 459; Settle *v.* Alison, 8 Ga. 301; Waggoner *v.* Cooley, 17 Ill. 239; Renwick *v.* Renwick, 9 Rich. (S. C.) 50; Cavin *v.* Smith, 24 Mo. 22; Jacks *v.* Hallow, 14 B. Mon. (Ky.) 133; Keener *v.* Kauffman, 16 Md. 296; Dickerson *v.* Chrisman, 28 Mo. 134; Morrill *v.* Foster, 33 N. H. 379; Van Blarcom *v.* Kip, 26 N. J. L. 351; Denton *v.* Perry, 5 Vt. 382.

[5] Phillips *v.* Cole, 10 Ad. & El. 106; Smith *v.* Whitingham, 6 C. & P. 78. In Spangs *v.* Brown, 9 B. & C. 935, an action for trover was brought for goods which had been distrained, and the plaintiff insisted that he was the tenant of one John Brown, and not of the defendant; and to establish this fact, shew that he had always paid the rent to John Brown. The defendant, to show that John Brown only acted as his agent, offered the account of payments rendered by John Brown to him. It was held that, John being alive, he should be called, and

apply, even though the declarant has absconded or his whereabouts are unknown, or from any cause the party is unable to produce him.[1] It was at one time supposed that it must also appear that the declarant had a competent or peculiar knowledge of the matters to which the declaration related;[2] but the later and better doctrine seems to be that *it is not necessary that the declarant should have made the statement as of his own knowledge*, but that the absence of such knowledge affects the *weight* and not the admissibility of the evidence.[3]

It is also indispensable that *the statement or entry should be against the proprietary or pecuniary interest of the declarant.*[4]

the account was rejected. Warner *v.* Price, 3 Wend. (N. Y.) 397; Cutbush *v.* Gilbert, 4 S. & R. (Penn.) 551; Cluggage *v.* Swan, 4 Binn. (Penn.) 150.

[1] Stephen *v.* Gwenap, 1 M. & R. 120; Brewster *v.* Doane, 2 Hill (N. Y.), 537; Moore *v.* Andrews, 5 Port. (Ala.) 107. But in Pennsylvania absence from the State has been held equivalent to death. Atton *v.* Berghaus, 8 Watts (Penn.), 77; Crouse *v.* Miller, 10 S. & R. (Penn.) 155. And in Massachusetts *insanity* has been held to be equivalent to death. Union Bank *v.* Knapp, 3 Pick. (Mass.) 36; Holbrook *v.* Gar, 6 Cush. (Mass.) 216. And in South Carolina absence from the State seems to be sufficient to let in proof of this class on the handwriting being proved. Elms *v.* Chevis, 2 McCord (S. C.), 349.

[2] Sussex Peerage Case, *ante;* Barker *v.* Kay, 2 Russ. 76; Higham *v.* Ridgway, 10 East, 122; Short *v.* Lee, 2 J. & W. 475.

[3] Crease *v.* Barrett, 1 C., M. & R. 925.

[4] Glynn *v.* Bank of England, 2 Ves. Sr. 38; Roe *v.* Rawlings, 7 East, 290; Gleadow *v.* Atkin, 1 C. & M. 424; Berkley Peerage Case, *ante;* Sussex Peerage Case, *ante;* Daves *v.* Lloyd, 1 C. & K. 276. It is not enough that the deceased was in a situation to know the facts, and if his proprietary or pecuniary interests are not affected, his entries or declarations are not admissible. Thus, in a Connecticut case, Abel *v.* Fitch, 20 Conn. 90, in which, in a controversy relative to the right of the defendant to maintain a dam at a certain height, the defendant offered in evidence a letter from one Hopkins (then deceased), who, at the time when the dam was raised, was in the defendant's employ as a miller, in which he stated the facts relative to the raising of the dam, as he understood them. The court rejected the evidence, and upon appeal this ruling was sustained, Ellsworth, J., saying: "It is nothing more than the opinion of a deceased man, given three years after this dam was built, as to what was its height, he then being miller. * * * Doubtless entries and admissions of deceased people are in some cases admissible, but the evidence now offered does not belong to that class. Entries by persons, since deceased, having full and peculiar means of knowledge, *made at the time, in the regular course of business,* in the usual and proper place and manner, especially *if in the discharge of one's duty*, are admissible

It is not enough that the statements affect the declarant injuriously; *they must also affect his proprietary or pecuniary interest, or they are not admissible.* Thus, in the Sussex Peerage Case,[1] in order to prove the marriage of the Duke of Sussex and Lady Augusta Murray, statements made by the clergyman who had married them at Rome, since deceased, were offered on the ground that they were clearly against his interest, *because they related to an act which rendered him liable to prosecution*, while living, or which, at least, he believed to be illegal. This evidence was rejected, LORD LYNDHURST saying: "It is not true that the declarations of deceased persons are in all circumstances receivable in evidence, when in some way or other they might injuriously affect the interest of the party making them. Nor is it true that, because, while living, a party would be excused from answering to certain facts, his declarations as to those facts become evidence after his death. These are not correlative, nor corresponding propositions." LORD BROUGHAM also said: "To say, if a man should confess a felony for which he would be liable to prosecution, that, therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced."[2] The amount of pecuniary interest is not important; *it is sufficient if, at the time the declaration or entry was made, it charged the person making it to any extent.*[3]

as a part of the *res gestæ*. So admissions of a deceased man, made against his interest, or by an agent, constituting or qualifying the transaction inquired after, may go to the jury. But the opinion of Hopkins has none of these qualities, nor is it accompanied with any of the safeguards of such evidence. It does not differ from the opinion or remark of any other person deceased, who was acquainted with the subject-matter in controversy."

[1] Sussex Peerage Case, 11 Cl. & F. 110, overruling Standen *v.* Standen, Peake, 45.

[2] But see Coleman *v.* Fraser, 4 Rich. (S. C.) 152, where an admission made by a clerk of the defendant that he had stolen a certain sum of money, as evidence against his principal, because it exposed the clerk to prosecution. See also Click *v.* Hamilton, 7 id. 66.

[3] R. *v.* Worth, 4 Q. B. 132.

Sec. 122. Entries in Private Books, Etc.

The cases in which this exception is most frequently applied, are *where entries have been made by a deceased person in the due course of business, in his private books, of money or property received by him from or for another person*,[1] and such entries are admissible to prove the facts, *even though no privity exists between the deceased and the person against whom the evidence is tendered*.[2] In many cases such entries may be admissible, although the person making them is still living, where they properly are a part of the *res gestæ*. Thus, in an English case,[3] in an action upon a bond given for the fidelity of a clerk, to the plaintiffs, in paying money and all his dues, it was shown that it was his duty to keep their books. He kept the books and entered therein the moneys received by him, and died. In admitting the entries as evidence against the sureties upon the bond, Lord Tenterden laid great stress upon the circumstance that the clerk was dead. But, inasmuch as these entries were made by the clerk in the line and as a part of his duty, it is clear that they were also admissible as a part of the *res gestæ*. In another case,[4] a collector's private book by which he collected and ticked off the sums paid, was offered in evidence. Several receipts given by the collector to private persons, for taxes paid by them, were produced, and the whole duly proved, the private books being seen with his family at the time of his death. All the entries and receipts were shown to have been in the usual line of business of the deceased in his office of collector, and the whole were received against his surety, on the ground that the entries were made by a deceased person against his interest.[5]

[1] Barry *v.* Babbington, 4 T. R. 514; Doe *v.* Taylor, 6 Bing. 562; Bree *v.* Beck, 1 Younge, 225; Edwards *v.* Rees, 7 C. & P. 340; Rogers *v.* Allen, 1 Camp. 309; Wynne *v.* Tyrwhitt, 4 B. & Ald. 376; Manning *v.* Lechmere, 1 Atk. 453; Harper *v.* Brooke, Woodeson's Lect. 332; Short *v.* Lee, 2 J. & W. 464. In Lee *v.* Va. & Maryland Bridge Co., 18 W. Va. 299, this exception was recognized.

[2] Whitmarsh *v.* Genge, 3 M. & R. 42; Middleton *v.* Milton, 10 B. & C. 317. This case overrules Gass *v.* Wattington, 3 B. & B. 138; Lee *v.* Va. & Maryland Bridge Co., *ante*.

[3] Whitmarsh *v.* Genge, 3 M. & R. 42.

[4] Middleton *v.* Milton, 10 B. & C. 317.

[5] Plaxton *v.* Dare, 10 B. & C. 17.

In this country many of the courts have adopted the idea that the declarations of the principal may bind in the same sense that those of an agent would, both being within the scope of their business. The words or declarations then are the acts or parts of acts; and it is for the acts of the principal that the surety is bound. In such a view, the principal need not be dead. You prove his entries or declarations the same as you do his other acts by a third person; and that without reference to the fact that he can be produced as a witness. In a Pennsylvania case [1] the defendant was surety for the good behavior of Cobbett, the editor. It was shown that a libel (a volume of "Porcupine") was paid for to Cobbett's common clerk, and this was admitted as the act of Cobbett. This case shows the principle. Here was the act of Cobbett by his agent. On this distinction the entries of a teller of a bank in a book kept in the bank, by which he daily stated his account, as teller, were received against him, to show his default in a suit against his surety. But his admissions, made in writing, after he was dismissed from his office, were denied by several of the judges. The former were likened by CHEVES, J., who delivered the opinion of the court, to the declarations of an agent within the scope of his authority, which are a part of the *res gestæ;* the latter to an agent's admission after he had ceased to act for his principal.[2] The court did not stop to inquire whether the teller was dead or alive. On the same principle, a jailer's receipt for a prisoner was held receivable against his surety.[3] So, a statement of an account with the bank by a cashier, explaining its receipts and defaults, made before his office terminated; for the sureties "were bound, not for themselves, but for *him;* and *his acts* and sayings of course bound them, and they must stand or fall by them." [4] So, the return of a sheriff that a *fi. fa.* is satisfied, is a declaration concluding his sureties in an action on their bond.[5] And so,

[1] Respublica *v.* Davis, 3 Yeates (Penn.), 128.

[2] State Bank *v.* Johnson, 1 Const. Rep. (S. C.) 404.

[3] Barnard *v.* Com., 4 Litt. (Ky.) 148.

[4] Pendleton *v.* Bank of Kentucky, 1 Mon. (Ky.) 171.

[5] Governor *v.* Twitty, 1 Dev. (N. C.) 153.

on the same principle, the inventory of an administrator is evidence in an action against his sureties.[1] Several of these declarations are obviously parts of the transactions for which the sureties are bound; and that is the true point of inquiry. They are like a part payment by the principal on a promissory note, which has been held to take it out of the Statute of Limitations, or to repel the presumptive bar of twenty years' delay in respect to the surety, who is jointly bound to pay.[2] The surety is bound that he shall do the very act which he is performing, to wit, payment, as the sureties were that the cashier should do his duty by passing accounts at the bank. Whereas, the mere acknowledgment of the principal with whom a surety is bound in a promissory note, has been held not to affect the latter; for such acknowledgment cannot be placed within the scope of the suretyship. The case of joint debtors, where both are principals, stands on a different footing; for they bind each other in respect to their joint interest, as *quasi* partners.[3] But after the lapse of six years, the admission of the principal cannot be received against the surety, even to take the case out of the Statute of Limitations.[4] And where the plaintiff took one Burnett in as a partner in the business of tanning, and the defendants covenanted with the plaintiff that Burnett should faithfully discharge his duty, as such partner, for two years from the 11th of January, 1833, in an action on the covenant, assigning breaches in 1823, admissions made by Burnett in 1825, that certain books offered by the plaintiff in evidence were the books of the firm, were held inadmissible against his sureties. "True," says HODMAN, J., delivering the opinion, "that while the principal is acting, his declarations may be so interwoven with his acts as to stand in direct connection with them, and form a part of the *res gestæ;* but when he ceases to act, his subsequent declarations have no direct connection with his preceding acts, so as to bind his sure-

[1] Chairman, &c., *v.* Harramond, 4 Hawks (N. C.), 339.

[2] Hunt *v.* Bridgman, 2 Pick. (Mass.) 584.

[3] Baker *v.* Briggs, 8 Pick. (Mass.) 122; Longenecker *v.* Hyde, 6 Binn. (Penn.) 1.

[4] Meade *v.* McDowell, 5 Binn. (Penn.) 195.

ties."[1] So, to implicate the surety of a sheriff, his acknowledgment that he had collected money was denied as evidence, though it was said by HOLMAN, J., "If this had been while he was officially acting in relation to the receipt of the money, the statement would have formed a part of the *res gestæ*. But declarations at any subsequent period are inadmissible. It is his *acts*, and not his admissions or declarations, for which the sureties are bound."[2] In Evans *v.* Beattie,[3] in an action against a guarantor of the sale of goods, LORD ELLENBOROUGH, C. J., rejected evidence of an admission by the principal that he had received the goods. "The stipulation," said he, "*was, to pay for goods received*, not for goods *acknowledged* to have been received." The ground upon which this decision rests is, that the principal is not the general agent of the surety, so that he can bind him by a subsequent acknowledgment respecting the goods furnished.[4]

Sec. 123. Exceptions to the Rule.

But there are a class of cases in our courts in which the admissions, declarations or acknowledgments of the principal, in this respect, are held to be admissible. Thus, in an early Pennsylvania case[5] the defendant had written to the plaintiff, offering to stand jointly bound with one Wilson for all contracts he might make. Subsequently Wilson sent a letter to the defendant, giving a statement of what he had purchased under the guaranty, and the plaintiff relied upon this letter to prove the contract and fix the amount, and it was admitted as evidence.[6] But in a late Iowa case[7] a letter written by the principal in a written obligation contain-

[1] Hotchkiss *v.* Lyon, 2 Blackf. (Ind.) 222.

[2] Shelby *v.* Governor, 2 Blackf. (Ind.) 289; Beal *v.* Beck, 3 H. & McH. (Md.) 242.

[3] Evans *v.* Beattie, 5 Esp. 27.

[4] Bacon *v.* Chesney, 1 Starkie, 192.

[5] Meade *v.* McDowell, 5 Binn. (Penn.) 195.

[6] See also Fenner *v.* Lewis, 10 John. (N. Y.) 38, where the admissions of a wife that she had received certain property for her husband, were held admissible. Simonton *v.* Boucher, 2 Wash. (U. S. C. C.) 473; Treasurers *v.* Bates, 2 Bailey (S. C.), 302, which seems to be directly opposed to the doctrine of State Bank *v.* Johnson, *ante*.

[7] Root & Sons Music Co. *v.* Caldwell, 54 Iowa, 432.

ing a statement of admissions made by the surety, was held not to be admissible in an action against the surety.

In all cases, entries or reports made by a principal in the due course of business, or which it is his duty to make, are admissible in an action against his surety,[1] but are held not to be conclusive upon him.[2] The term "declaration," as applied to the exception which we are considering, embraces *all written statements, whether made at the time of the fact declared or at a subsequent day*,[3] which are against either the *proprietary or pecuniary interest of the person making them.*

Sec. 124. Illustrations of the Application of this Exception.

Entries, in the books of a corporation, of a collector of taxes, an agent, steward, bailiff, receiver, etc., subject to the inspection of others, charging the party making it with money or property received, come clearly within the exception, as also do entries in private books kept solely for the convenience of the owner, and in his custody; and such entries are admissible, although they form only a part of a general debtor and creditor account, the balance of which is in favor of the receiver,[4] because, to the extent of such entries, the admission is against the interest of the party making them, and the balance in his favor would be diminished to that extent. The question as to whether an entry made by a person, acknowledging the payment of money as due to himself, is admissible as a declaration against interest in cases where such entry is itself the only evidence of the charge of which it shows the subsequent liquidation, is one upon which the authorities are conflicting,[5] but the weight

[1] Stern *v.* People, 102 Ill. 540.

[2] Ohning *v.* Evansville, 66 Ind. 59, overruling State *v.* Grammer, 28 id. 530; State *v.* Pruther, 44 id. 287, and disapproving Baker *v.* Preston, Gilmer (Va.), 235.

[3] Doe *v.* Surnford, 3 B. & Ad. 898; Short *v.* Lee, 2 J. & W. 475.

[4] Williams *v.* Graves, 8 C. & P. 592; Clark *v.* Wilmot, 1 Y. & C. 53; Rowe *v.* Brenton, 3 M. & Ry. 267; R. *v.* Worth, 4 Q. B. 134.

[5] Doe *v.* Vawles, 1 M. & Rob. 261, and Doe *v.* Burton, 9 C. & P. 254, held that such entries are not admissible; while R. *v.* Hendon, cited *arguendo* in 9 C. & P. 255, and R. *v.* Lower Hayford, cited 2 Smith's Leading Cases, 194, *n.*, held that they are. See Calloway *v.* McMillan, 11 Heisk. (Tenn.) 557, where entries in a decedent's book of payments made by him *to* the plaintiff were held to be inadmissible, as

of authority seems to be decidedly in favor of their admission.[1] In an action for the recovery of money, against the administrator of a bailee, a memorandum book offered by the defendant and admitted in evidence was proved to be in the handwriting of the bailee, and it was shown that the entries were contemporaneous with the occurrence of the transactions. It was held that these memoranda were in the nature of a statement by a trustee of his doings as such. They charged him with various matters, and most of the entries were against his own interests. Hence the entries, though not conclusive, were evidence for the jury to consider.[2]

So, too, memoranda made by a sheriff, in a book kept by him for that purpose, are admissible as evidence in a suit between third parties, after the death of the sheriff, where the entries were made in the course of his official business, and were against his interest at the time.[3] The fact that a person who made entries in a ledger was not a clerk in the store, but was employed merely to post the books of the party offering them in evidence, cannot exempt such evidence from the operation of the general rule which permits entries made by a person against his interest to be offered in evidence. Thus, where the plaintiff offered in evidence his original ledger book, containing entries in the handwriting of the defendant's testator, and afterwards his day-books, containing daily entries against deceased and other parties, but all in the hand writing of the testator, it was held that although these entries would not have been admissible for the purpose of charging a third person, because made by a clerk in the ordinary discharge of his duty, and contemporaneous with the transactions to which they related, yet they were admissible as declarations or admissions made by the party against his interest.[4]

they were neither entries against interest or in an official employment.

[1] 2 Smith's Leading Cases, 194; R. *v.* Hendon, cited 9 C. & P. 255; R. *v.* Lower Hayford, 2 Smith's Leading Cases, 194, *n.*; Higham *v.* Ridgway, 10 East, 109.

[2] Gaines *v.* Gaines, 39 Ga. 68; Buckley *v.* Buckley, 12 N. W. 423. In State *v.* Castle, 79 N. C. 34, it was held that to render business entries of deceased persons admissible, the evidence that they were original and contemporaneous must be extrinsic.

[3] Field *v.* Boynton, 33 Ga. 239.

[4] Ward v. Leitch, 3 Md. 326.

Sec. 125. Person Making, must be Dead.

The turning point in the admission of this class of entries is, that the person who made the entry is dead. Being dead, the entry in discharge proves not only the simple fact of payment, so as to extinguish the debt, but may be received to every incidental matter stated in the declaration. Thus, the entry in the books of the midwife proved not only the payment, but the time of the birth.[1] The entry of a deceased attorney of the payment to him of a part of the judgment, proved not only the payment, but by whom it was made, and on what account, distinguished between the principal and the surety.[2] But the rule is otherwise where the declarant is alive. Thus, in an action by one surety against another, for contribution of money paid by one plaintiff on a bond to West and others, after the plaintiff had proved the payment, the defendant insisted that, before the plaintiff had paid, the principal had discharged the debt, so that the plaintiff had paid in his own wrong. To show the previous payment, the defendant proved that the principal had paid money to the obligees, and then offered to prove the admission of West, one of the obligees, that such payment had been made on account of the bond. It was objected that West should be called, and the objection sustained. PARKE, J., remarked that what West said at the time of the payment might be received as a part of the *res gestæ;* but any declaration made after payment, upon what account he received the money, is no evidence against the plaintiff. His unsworn declaration cannot bind any interest of the plaintiff.[3] And a mere oral declaration of this character, coming from the creditor, even after his decease, would be inadmissible. In a like action for contribution, the defendant offered to prove, by the creditor's acknowledgment, she being dead, that the defendant had paid $300 of the money as surety. This was offered in order to reduce the amount of contribution. The fact of payment, or by whom, or on what

[1] Higham *v.* Ridgway, *ante.*

[2] Thompson *v.* Stevens, 2 N. & McCord (S. C.), 493.

[3] Dunn *v.* Slee, Holt N. P. 399.

account made, was not offered to be proved in any other way. The evidence was rejected as hearsay. The court said such admissions ought not to be received at all, except against the party making them, or those claiming under him.[1] In a similar action, a receipt for the moneys, signed by the attorney on record, of the creditor who had sued and obtained judgment against the sureties, was denied as evidence between the latter, though offered merely to show the payment of the money, the attorney being still alive.[2] The receipt was obviously no better evidence than if made by the party instead of his attorney; it would be *prima facie* evidence against the former, but as between the sureties, or between them and their principal, was no more than a written statement, without oath. When a letter of the alleged receiver of goods on commission was produced against the defendant, who was sued for having fraudulently recommended the receiver as credit-worthy, acknowledging the delivery of the goods, it was rejected, TILGMAN, J., saying: "Collusions might be formed between plaintiffs and their witnesses, who might easily be induced to make declarations in letters which they would be afraid to verify on oath in open court."[3] In assumpsit for goods sold to defendant's wife, who was entitled to a separate maintenance payable by the defendant to trustees, the material question was, whether the maintenance had been regularly paid. To show this, the receipts of the trustees were offered in evidence by the defendant. Held inadmissible; and, *per curiam*, "A man's receipt is not evidence to prove a payment against a third person. Those who gave the receipts should have been called."[4] In trover for goods distrained, the plaintiff insisted that he was tenant of John Brown, and not of the defendant, Hugh Brown; and showed that the payment of rent had always been to John. To show that John had received the money as the defendant's agent, the latter offered John's account of the payments rendered

[1] Thomas *v.* Thomas, 2 J. J. Mar. (Ky.) 60.

[2] Warner *v.* Price, 3 Wend. (N. Y.) 397.

[3] Longenecker *v.* Hyde, 6 Bin. (Penn.) 1.

[4] Cutbush *v.* Gilbert, 4 S. & R. (Penn.) 551.

by him to the defendant. Held that John, being alive, should be called; and the account was rejected.[1]

In another action it appeared that one Beaman had, with three others, signed a note to the Bank of Rutland. He insisted that he was their surety; and to prove that he paid the money, produced and offered in evidence the receipt of the cashier, indorsed on the note, stating that he had paid the money. The judge refused to receive this as evidence either of payment or of the person who paid, there being no proof that the cashier was dead; indeed, it was admitted that he was living, and but a little way off. And afterwards, on motion for a new trial, the judge refused it.[2]

The general rule, therefore, is, that certificates, receipts, or other admissions of payments, made by persons other than the party to the suit in which they are offered, cannot be received; but such payments must be proved by a witness.[3] Accordingly, the certificate of a living surveyor, that he had received his fees of survey, being offered to affect a party in a suit with which the surveyor had no concern, was held inadmissible. And the admission of the plaintiff's agent to collect the money, that he had made the collection, is no evidence against his principal.[4]

It cannot be denied, however, that the rule has been departed from in one or two cases. Thus, where one Sherman authorized Crosby to settle a suit brought against the former by Bennet, and pay the money to be found due on the settlement, in a suit between the two former, wherein Crosby claimed the money as paid by him on the settlement, a receipt for the money as paid on the judgment in the cause, signed by Bennet, was admitted as evidence of the settlement and payment, to charge Sherman.[5] The court say the receipt was *prima facie* evidence of the demand and payment; and it lay with Sherman to impeach it. Of this case it

[1] Spargo *v.* Brown, 9 B. & C. 935.

[2] Beaman *v.* Cushman, Washington Circuit, June, 1833, before COWEN, CIRCUIT JUDGE.

[3] Cluggage *v.* Swan, 4 Binn. (Penn.) 150.

[4] Davis *v.* Whitesides, 1 Dana (Ky.), 177.

[5] Sherman *v.* Crosby, 11 John. (N. Y.) 70.

should be remarked that there was no pretense that Bennet was not alive, and within the jurisdiction of the court. He stood as creditor, and Crosby paid the money to him at the request of Sherman. The amount of the decision is, that in all actions for money paid, the receipt of the payee, though he be alive, shall be admissible to charge the defendant with the fact of payment. Bennet was not an agent, nor a joint party with Sherman, either on the record or as having a common interest; the receipt might or might not have been a part of the *res gestæ*, but the latter did not appear, for no act was shown to which the written declaration would attach. To put it on the latter ground would, therefore be a plain instance of the *petitio principii*. In a word, there seems to be no instance, if we except the next case, *infra*, within which Sherman *v.* Crosby can be brought. It would operate to reverse the entire rule laid down by TILGHMAN, C. J., in Cluggage *v.* Swan, *supra*. Receipts and certificates of private persons would become substitutes for their sworn testimony. In actions for money paid, this new kind of written evidence would be the universal, because the ready, medium of proof, which may, according to TILGHMAN, C. J., *supra*, be collusively introduced; and, we may add, amended, like a notary's certificate to charge an indorser, or a justice's exemplification of his proceedings, till it shall be full and plain to the purpose. It would be a convenient mode of proof for fraudulent purchasers of property, under pretense of having paid large debts for the insolvent, or paying him a large consideration. Both the time and the amount of payments are generally of great consequence in such cases; and the strictest rules of evidence can with difficulty guard against imposition. In another case the plaintiff sued for passage money to Europe, paid for the defendant's testator, and the captain's oral admission, made about the time the testator sailed, was received as proof of the payment. The captain was dead, and the court below put it on this ground. On error, the court repudiated that principle, and said, whether the captain was dead or alive, the testimony was admissible, being made by one able to bind himself by a receipt or acquittance, and made too about

the time of the testator's sailing. If it were to stand on the ground of the captain's death, perhaps the court would require that it should have been in writing.[1] This is doubtless a safer case than Sherman *v.* Crosby. The captain being dead, it wants only the form of a written entry to bring it within the English rule. But whether dead or living, the oath of the hearer could fix the time when the declaration was made; and prevent imposition in that particular. This case, however, fails as to any support from the declaration being a part of the *res gestæ*. Proof *aliunde* that money was paid, and that the declaration was contemporaneous with the payment, would alone give it that character, so as to bring it within the suggestion of PARKE, J., in Dunn *v.* Slee, *supra*. It seems also to fail in support from any adjudged case founded on the declarant's death; for we believe not one has gone the length of saying that oral declarations of a person, however much it may militate against his interest, shall be received merely upon the ground that he is dead. Not only must the declaration be written, but its introduction has generally been accompanied with circumstances calculated affirmatively to repel suspicion that it may have been simulated.

Sec. 126. May be used as Evidence of Collateral and Independent Matters, when.

The rule seems to be that, where an entry is against the interest of the person making it, he being dead, *it may be used as evidence of collateral and independent matters, which, although not strictly against the interest of the declarant, yet form a part of the transaction.* Thus the entry in an accoucheur's book[2] was held admissible to prove the age

[1] Holladay *v.* Littlepage, 2 Munf. (Va.) 314.

[2] In Higham *v.* Ridgway, *ante*. See also Warren *v.* Greenville, 2 Strange, 1129. In Nourse *v.* McCoy, 2 Rawle (Penn.), 70, the account book of a deceased magistrate, showing charges for taking of three other deeds on the same day and no charge for the one in question, was held to be admissible upon a trial of a person for forgery of a deed which purported to have been executed by the person making such acknowledgments before the same magistrate, upon the ground that as *res gestæ* they afforded a presumption as to other facts, and that an *omission* in a course of usual entry is often as strong a fact as an entry.

of the child deceased, the entry containing a statement of the accoucheur's attendance and his charge therefor, and being marked "paid." In this case the entry would not have been admissible, except for the entry of "paid," which brought it within the rule, as being against interest; LORD ELLENBOROUGH, in answer to the argument that only that portion of the entry containing the word "paid" could be used, saying, "It is idle to say that the word "paid" only shall be admitted in evidence without the context, which explains to what it refers; we must therefore look to the rest of the entry to see what the demand was which he thereby admitted to be discharged." And this principle has been acted upon in many cases since.[1] But it must be remembered that, in order to make entries against interest evidence of independent matters, *there must be a direct connection between the entries and the matters they are sought to establish, and such entries can have no bearing upon matters separate and distinct therefrom.*[2] In other words, an entry which is admissible after the maker's death, because made in the course of business, is evidence of those things only which, according to the course of that business, it was the duty of the deceased person to enter. In an early English case[3] the plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names, and that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery. Otherwise of the shop-book itself singly, without more. According to the En-

[1] Marks *v.* Lahee, 3 Bing. N. C. 408; Davis *v.* Humphrey, 6 M. & W. 153; Doe *v.* Robson, 15 East, 32; Slead *v.* Heaton, 4 T. R. 669; Leter *v.* Warren, 5 Q. B. 773. In Heath *v.* West, 26 N. H. 191, on a question of minority, the charge of an accoucheur for his services, and his testimony that it was correctly made at the time, was held to be evidence, although he did not recollect the date.

[2] Knight *v.* Waterford, 4 Y. & C. 283.

[3] Price *v.* Torrington, 1 Salk. 285.

glish cases, if the drayman had notified a clerk or book-keeper of the plaintiff of the delivery of the beer, and the latter had made the entry, it would not be admissible, because it would then be an entry predicated upon mere hearsay,[1] and there can be no question as to the soundness of this rule. A written statement of a fact which the person making knew nothing about, except what he has heard from others who did, or pretended to, know, is no better evidence than any ordinary hearsay. The circumstance that it is written gives it no additional character or value. It was in its inception, and must always remain, mere hearsay. The application of this branch of the rule is well illustrated by the case last cited.[2] In that case, in an action for the price of coals which had been sold at the pit's mouth, an entry was rejected which appeared to have been made in the following manner: In the ordinary course of business it was the duty of one of the workmen at the pit, named Harvey, to give notice to the foreman of the coal sold; and the foreman, who was not present when the coal was delivered, and who was unable to write, used to employ a man named Baldwin to make entries in the books from his dictation. Baldwin read over these entries every evening to the foreman. At the time of the trial Harvey and the foreman were dead, and Baldwin was called to produce this book, with the view of proving thereby the delivery of the coal in question; but the court held that it was inadmissible. The ground of this decision appears to have been, that, although the entries, being made under the foreman's direction, might be regarded as made by him, yet, inasmuch as he had no *personal knowledge* of the facts stated in them, but derived his information at second hand from the workman, there was not the same guaranty for the truth of the entries as might be found where the party making the entry had himself done the business, a memorandum of which he had inserted in his book. But such an entry is admissible if the person reporting the facts embraced therein is produced and testifies to the correctness of his report,[3] as it is immaterial how

[1] Brain *v.* Preece, 11 M. & W. 773.
[2] Brain *v.* Preece, 11 M. & W. 773.
[3] Payne *v.* Hodge, 71 N. Y. 598.

the truth of the facts stated in the entry is proved, provided it *is* proved. In a Connecticut case,[1] in an action for goods sold, the account books of the plaintiff, containing a charge of the goods to the defendant, made in the regular course of business, are admissible in support of his claim; and it does not affect the question of their admissibility that the entry was made by the plaintiff upon information of the sale given him by a salesman in his employ, who had sold and delivered the goods at a distant place; nor the fact that the delivery of the goods is admitted, and the only question is whether they had been purchased by the defendant or only taken to be sold on a commission. The circumstances in which an entry was made, so long as it was made in the regular course of business, affect only its weight as evidence. The fact that it is or was the custom of a person to enter certain matters in his book, they not being against his interest, and it not being his duty to enter them, does not render the entry admissible. Thus, in an English case,[2] it became necessary to show that a contract of service had been for less than a year; and, in order to do this, proof was given that the employer, who was dead, had in the course of his business been in the habit of hiring farm servants, and that his practice, when he did so, was to enter the time and terms of such hiring in a book kept by him for that purpose. This book, which contained entries of the service in question, and showed that the servant had been engaged for half a year only, was tendered in evidence; but the court held that it was inadmissible, on the ground that, although it might be the practice of the master to make such entries, it was not his *duty* to do so.

Sec. 127. Similarity between Rule as to Entries made by Persons in Office, Etc., and as to Declarations of Deceased Persons.

In many respects the rules which regulate the reception of entries made by deceased persons are the same as those which prevail with respect to declarations against interest. For instance, the death,[3] the handwriting, and the official

[1] Smith *v.* Law, 47 Conn. 431.

[2] R. *v.* Worth, 4 Q. B. 132.

[3] See Cooper *v.* Marsden, 1 Esp. 1, *per* Lord Kenyon.

character of the person who made the entry must be proved; and it should further appear that he had no motive to misstate. In some particulars, however, there is a marked distinction between the two classes of cases. Thus, in order to render admissible entries made in the course of office or business, they must, unlike declarations against interest, be proved to have been made *contemporaneously with the acts which they relate*. "It is to be observed," said PARKE, B., "that in the case of an entry against interest, proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it was made it is admissible; but in the other case (of an entry made in the course of business) *it is essential to prove that it was made at the time it purports to bear date;* it must be a contemporaneous entry."[1] In using the word "contemporaneous," *it is not meant that the entry must have been made at the immediate time of the occurrence; but it will be sufficient if made within so short a time after as reasonably to be considered part of the transaction.* Thus, if the business is done in the morning, and the entry is made in the evening of the same day,[2] or perhaps even on the following morning,[3] it will be sufficient; though, where several intermediate days had elapsed between the date of the transaction and the time of inserting an entry of it in the book, the evidence has been rejected;[4] and in one case the interval of a single day was held to constitute a valid objection.[5] So, too, as we have seen, declarations against interest are often admissible to prove *independent matters*, which, though forming part of the entry, are not in themselves against the interest of the declarant. A stricter rule, however, prevails with respect to official or business entries, and it may be said that *whatever effect may be due to an entry made in the course of office, reporting facts necessary to the performance of a duty,*

[1] Doe *v.* Turford, 3 B. & Ad. 897; Poole *v.* Dicas, 1 Bing. N. C. 654.

[2] Price *v.* Torrington, 1 Salk. 285; Ray *v.* Jones, 2 Gale, 220; Curren *v.* Crawford, 4 S. & R. (Penn.) 3, 5.

[3] Ingraham *v.* Bockins, 9 S. & R. (Penn.) 285.

[4] Forsythe *v.* Norcross, 5 Watts (Penn.), 432.

[5] Walter *v.* Bollman, 8 Watts (Penn.), 544.

the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances.[1] Thus, where it became necessary to show in what *place* the plaintiff had been arrested, and in order to do this, a certificate of a deceased sheriff's officer, which had been returned by him to the office in the ordinary routine of his duty, and which specified, among other circumstances connected with the arrest, the spot where it took place, was tendered in evidence. The court, while admitting that the certificate was evidence of the arrest itself, as also of the day when it was made, since it might be necessary for the officer to make known these facts to his principal,—

[1] Chambers *v.* Bernasconi, 1 C., M. & R. 368. In Mississippi it is considered to be a settled principle of the common law, that a memorandum of one who knew the fact, had no interest to falsify it, and which was made by him as a public officer in the regular course of his business as such, he being dead, is admissible evidence; and accordingly the written entry or memorandum of a deceased notary, as to demand and notice, in case of promissory notes, was held admissible. Ogden *v.* Glidewell, 6 Miss. 179; Bodley *v.* Scarborough, id. 729.

In Maine, Augusta *v.* Windsor, 19 Me. 317, in assumpsit for charges incurred by the plaintiffs on account of a pauper properly chargeable on the defendants, it became important to show *at what time* one Linscott had *had his leg broken;* and for the purpose of fixing the *date*, the plaintiffs offered in evidence a day-book of Dr. Neal, of Gardiner, containing two charges against Linscott, one dated Sept. 28, 1821, and the other, Sept. 29 of the same year, for reducing a fracture in his leg and for medical attendance. It was further proved that Dr. Neal attended and set Linscott's leg; that he died in 1839; that he was a regular practicing physician in 1820 and 1821; and that the book introduced was in his handwriting. The evidence was held admissible. And in a later case it was held that contemporaneous entries by third persons in their own books in the ordinary course of business, where the matter is within their knowledge and there is no apparent motive to pervert the fact, are evidence. Dow *v.* Sawyer, 29 Me. 118.

In Alabama it is held that books of accounts kept by a deceased clerk, and other entries or memoranda made in the course of business or duty, by any one who would at the time have been a competent witness to the fact which he registers, are admissible evidence; and that if the book containing the original entry has been destroyed or lost, a copy, proved by the oath of a person who copied it, is admissible; and accordingly a sworn copy, from the book of a deceased warehouseman and weigher, of an entry of the weight of some bales of cotton, the book itself having been destroyed in a fire, was decided to be admissible in a suit between third parties. Batre *v.* Simpson, 4 Ala. 306; Brown *v.* Steel, 14 Ala. 63.

were all clearly of opinion that it could not be received to show the particular spot where the caption took place, that circumstance being merely collateral to the duty done.[1] This decision turned on the circumstance that the sheriff's officer was going beyond the sphere of his duty when he made an entry of the *place* of arrest, and that such an entry therefore had no claim to be received as evidence of that fact.[2]

Sec. 128. Where Entries are made by Agents, Etc., in due Course of Office or Business; Books of Account, Etc.

Where entries are produced which were made by persons acting for others, as agents, clerks, etc., some proof of agency is required, although, if the principal can be shown to have adopted or acted upon the entries, this would doubtless be sufficient. Thus, in a New York case,[3] in an action against one of the directors of a fair association for goods sold and delivered, an entry of an order in the plaintiff's order book, headed with the defendant's name, was held to be competent to show that the plaintiff acted on the order and charged the goods to the defendant. Without proof that the entry was made by some person having authority to make it, it is not admissible, although made many years before, in one case one hundred and sixty years before it was offered in evidence.[4] But where the books came from the

[1] Chambers *v.* Bernasconi, 1 C., M. & R. 347, 368.

[2] Poole *v.* Dicas, 1 Bing. S. C. 655. In Nichols *v.* Webb, 8 Wheat. (U. S.) 326, an entry by a notary who was dead, upon a book which was shown to contain a regular record of his rational acts, was admitted to prove demand and notice. The entry was as follows: "Endorser duly notified in writing, 19th July, 1819, *the last day of grace* being Sunday, the 18th." STORY, J., said: "We think the acts of a public officer, like a notary public, admissible, *although they may not be strictly official, if they are according to the customary business of his office,* since he acts as a sworn officer, and is clothed with public authority and confidence." But see Bank of Wilmington *v.* Bradun, 1 Harr. (Del.) 14; Bank of Wilmington *v.* Cooper, 1 id. 10; Spurm *v.* Baltzell, 1 Fla. 392, where the rule stated in the text is adopted and the force of such entries is confined to the *facts*, which it is the duty of the officer to state.

[3] Wilcox *v.* Silver Plate Co., 72 N. Y. 17.

[4] Manby *v.* Curtis, 1 Price, 225; Davies *v.* Morgan, 1 C. & J. 590; Short *v.* Lee, 2 J. & W. 466; Stand *v.* Bradford, 2 Penn. 384; Jermain *v.* Dennison, 6 N. Y. 276; Richardson *v.* Kimball, 28 Me. 463.

proper custody, and contain strong internal evidence of their genuineness, slight proof of the authority or official character of the writer will be sufficient to let them go to the jury,[1] and, indeed, according to the cases cited, if the internal evidence of their genuineness is strong, this may be sufficient of itself. It is not, in the case of books of account kept by a deceased person, any objection to its admissibility that it contains entries *in* his interest, as well as against it. Thus, where the book contained entries of sums received by the deceased, upon one side, and upon the other entries of sums paid by him,[2] it was held to be admissible, even though the books shew a balance in his favor.[3] Entries made by a deceased clerk or agent, made in the usual course of business, as required in the line of his duty, upon proof of his handwriting in the book, and the book, upon inspection by the court, appearing to be fairly kept, are evidence of the facts stated therein.[4] But in order to give them that effect, the entries must appear to have been made in the usual course of business and of his employment,[5] the books to have been properly kept,[6] and the items charged therein must be proper subjects of book charge,[7] as a party cannot be permitted to make evidence for himself by making entries upon his books of account as to matters which do not properly enter into or form a matter of account; and in this connection it may be said that nothing can be the subject of book account which cannot be recovered under the general counts in assumpsit.[8] Thus, in the case last cited, a factor agreed to return to his principal all property remaining unsold in his hands after the termination of his agency. But he failed to do so, and the property was charged to him in account. The court held that inasmuch as it was not shown that the

[1] Brume *v.* Thompson, 6 Marsh. 36; Leter *v.* Warren, 5 Q. B. 773; Doe *v.* Thynne, 10 East, 206.

[2] Raure *v.* Brenton, 3 M. & R. 268.

[3] Williams *v.* Graves, 8 C. & P. 592; Moone *v.* Deandee, 2 Y. & C. 259 *n.*; Clark *v.* Wilmot, 1 Y. & C. 53.

[4] Dow *v.* Sawyer, 29 Me. 117.

[5] Lockey *v.* Schreiber, 17 Mo. 146.

[6] Kent *v.* Garvin, 1 Gray (Mass.), 148.

[7] Henshaw *v.* Davis, 5 Cush. (Mass.) 145; Earle *v.* Sawyer, 6 id. 142; Inslee *v.* Prall, 23 N. J. L. 457; Cale *v.* Dial, 8 Tex. 547.

[8] Kidder *v.* Lawless, 44 Vt. 303.

property had been converted into money, a recovery could not be had against the defendant therefor in book account. The proper remedy was trover.

Not only entries, but declarations made by deceased persons against their interest, are received in a variety of cases, and when admitted, they are evidence of all the facts stated therein, although some of them may not have been within the personal knowledge of the party making them,[1] and although, if living, the party making them could not have been admitted to testify to the fact, by reason of interest,[2] or would have been excused from answering questions relative to it.[3] The books of a deceased mason, containing charges for the repair of a bridge, which was marked as "*paid*," was admitted not only to prove the fact of repairs, but also to fix the liability of a parish with an obligation to make them.[4] So an entry found in the books of J., as follows: "J. W. paid me three months' interest," followed by other entries indicating a loan to J. W., was held to be *prima facie* against J.'s interest, and therefore admissible.[5] Entries made by a deceased agent, or person having the custody of another's lands, of money received by him from different persons in settlement for trespasses committed by them upon the lands, are admissible to prove the principal's right to the lands,[6] and it seems that in such cases, if the book or docu-

[1] Crease *v.* Barrett, 1 C., M. & R. 319; Percival *v.* Manson, 7 Exch. 1; R. *v.* Birmingham, 1 B. & S. 763. But the entries must be directly against the interest of the person making them. Thus, in Smith *v.* Blakey, D. R, 2 Q. B. 326, a letter from a deceased manager of the plaintiff's business, stating that the defendant had sent three cases to the office, and giving detail of the transaction under which they were sent, was held not to be admissible, as the possibility of pecuniary loss to the manager in the event of the loss of the cases was too remote.

[2] Gleadau *v.* Atkin, 1 C. & M. 424; Short *v.* Lee, 2 J. & W. 487.

[3] Sussex Peerage Case, 11 Cl. & F. 110.

[4] R. *v.* Heyford, 2 Sm. Lead. Cas. (5th Am. ed.) 194.

[5] Taylor *v.* Witham, 3 Ch. Div. 605. In this case, and the one cited in the last note, the decision of LITTLEDALE, J., in Gallup *v.* Vawles, 1 M. & Rob. 261, was disapproved.

[6] Barry *v.* Bebbington, 4 T. R. 514. And it has been held sufficient, even though the entry is signed by a third person, where the authority to sign for the real agent appears upon the books to have been recognized and acted upon, and the person signing debits himself with the balance. Ashburnham *v.* Michael,

ment is old and comes from the proper custody, it is not necessary to prove the handwriting of the agent.[1] A bill of lading, signed by a deceased master of a vessel, for goods consigned to a named consignee, is evidence, of property in the consignee, even in an action of trover against a third person;[2] and in an action against a co-surety for contribution, a receipt given by a deceased creditor, professing to acknowledge a payment by the plaintiff of a sum of money "originally advanced to E. H.," is evidence not only of the payment, but also of the original advance to E. H. as principal debtor.[3] Entries made by a deceased collector of taxes, charging himself with the receipt of money, and made by him in the books of his office, are admissible in an action against his surety to prove the receipt of the money by him;[4] and this is also the rule as to entries made by any person, in actions against his sureties for his malfeasance.[5] It has also been held that an entry in a tax collector's books, showing that a certain person is rated for a particular house, is evidence that he was the occupier of the house at the time.[6] Where the party who made the entry is alive, even though he is out of the jurisdiction, so that he cannot be called as a witness, yet the proof or the entry is generally inadmissible.[7] But after the lapse of a long time, the death of the party

17 Q. B. 276. That the entry, if it specifies the tenure of land for which money is paid, is evidence of such tenure, see Harper *v.* Dodd, Woodeson's Lect. 332. A declaration by a deceased occupier of land that he rents it of A. is evidence of A.'s seizin. Uncle *v.* Watson, 4 Taunt. 16; Came *v.* Nicholl, 1 New Cas. 430. The principle upon which this rule rests is, that, occupation being presumptive evidence of a seizin in fee, *any declaration claiming a less estate is against interest.* Crease *v.* Barrett, 1 C., M. & R. 931. It is upon this ground that an admission in any form by a deceased occupier that he held only a life estate is evidence of such limited interest. Welsh *v.* Sangfield, 16 M. & W. 497. Such declarations may be proved by recitals in deeds. Sly *v.* Sly, 2 P. D. 91.

[1] Wyman *v.* Tyrwhitt, 4 B. & Ald. 376.

[2] Hadden *v.* Parry, 3 Taunt. 305.

[3] Davies *v.* Humphrey, 6 M. & W. 153.

[4] Gass *v.* Wattington, 3 B. & B. 132; Middleton *v.* Melton, 10 B. & C. 317.

[5] Whitnash *v.* George, 8 B. & C. 566.

[6] Strode *v.* Seaton, 2 Ad. & El. 171; Smith *v.* Cartwright, Ry. & M. 62.

[7] Stephen *v.* Gwenap, 1 M. & Rob. 121.

making the entry will be presumed, and in one case the lapse of fifty-five years was considered enough to dispense with proof of death, although, if alive, he would not have been of an age beyond the ordinary term of human life.[1]

It is doubtful whether the oral declaration of a deceased collector, made when paying over money to the landlord, that he received it from A., is evidence against A., of a payment *by him*.[2] If it is treated as a declaration accompanying an acknowledgment of money received, its value as a declaration against interest is neutralized by the contemporaneous payment. It is, at most, a disinterested statement made at the time, and in explanation of a payment. Generally, the question of admitting statements against interest made by deceased persons occurs where the suit is *inter alios*, and the declarant is a stranger to it; and it has therefore been doubted whether, in a suit by an executor to recover the balance due on an alleged contract for work done, the plaintiff could put in evidence a declaration of the testator to a third person respecting a payment made by the defendant to the testator, in order to prove the liability of the defendant for certain extra work.[3]

The declarations against interest of persons who at the time of making them stood in the same situation and interest as the party to the suit, are evidence against that party. Thus, the declaration of a former owner of the plaintiff's land, that he had not the right claimed by the plaintiff in respect of it, is admissible.[4] Such declarations are admissible, though the maker is alive and not produced. S. C. So, the landlord's description of property in a former lease is evi-

[1] Ashburnham *v.* Michael, 17 Q. B. 276.

[2] Fursdon *v.* Clogg, 10 M. & W. 572.

[3] Edie *v.* Kingsford, 14 C. B. 759. But in Bradley *v.* James, 13 C. B. 822; 22 L. J., C. P. 193, where the plaintiff sued as executor of the payee of a note, he was allowed to rebut the Statute of Limitations by proof of a written acknowledgment, made in a book by the testator, of payment of interest on the note by defendant within six years. So, entries on the debtor side of testator's account book of the receipt of interest on a sum of money for which the executors were suing, were held admissible to prove that the money was lent, and not given, to the defendant, the testator's son. Peck *v.* Peck, 21 L. T., N. S. 670.

[4] Woodway *v.* Rowe, 1 Ad. & El. 114.

dence for a third person against a subsequent lease of the same landlord, but not against a prior lessee.[1] A declaration in an answer in Chancery by one who has sold property, is not evidence against a person claiming under him by a conveyance anterior to the bill filed.[2] The declarations of tenants are not evidence against reversioners, though their acts are.[3] Where an entry or declaration is made by a *disinterested* person in the course of discharging a professional or official duty, it is generally admissible after the death of the party making it. Thus, a notice, indorsed or served by a deceased clerk in an attorney's office, whose duty it was to serve notices, is evidence of service.[4] So, the entries in the books of a deceased solicitor in his handwriting, relating to a deed prepared by him and executed by a deceased client, were held good evidence of the execution of the deed.[5] And a receipt signed by a clerk employed by a collector to collect for him, proves a payment to the collector himself.[6] It should seem on principle that contemporary *oral* declarations so made in course of business may also be admissible.[7] Whether an oral statement made by a receiver on paying over money is evidence not only of the receipt, but also of the very party from whom it was received, has not been decided.[8] An attorney's bill with an indorsement upon it, "March 4, 1815, delivered a copy to C. D.," which is proved to be in the handwriting of a deceased clerk, whose duty it was to deliver a copy of the bill, and proved to have existed at the date, has been held to be evidence to prove the delivery of the bill.[9] It has been held that a banker's ledger was receivable in evidence, in an action between the assignees in bankruptcy of a customer and a third party, to show that

[1] Crease *v.* Barrett, 1 C., M. & R. 919.

[2] Gully *v.* Exeter, 5 Bing. 171.

[3] Tickle *v.* Brown, 4 Ad. & El. 378; Accord. Papendick *v.* Bridgewater, 5 E. & B. 166.

[4] Patteshall *v.* Turford, 3 B. & Ad. 890; Padwick *v.* Skinner, 3 Exch. 84; R. *v.* Dukinfield, 11 Q. B. 678.

[5] Rawlins *v.* Richards, 28 Beav. 370; Waldy *v.* Gray, L. R., 20 Eq. 238. See Sly *v.* Sly, 2 P. D. 91.

[6] R. *v.* S. Mary, 1 E. & B. 816.

[7] Sussex Peerage Case, 11 Cl. & Fin. 113; *Semb.* acc. Stapylton *v.* Clough, 2 E. & B. 933.

[8] Fursdon *v.* Clogg, 10 M. & W. 572.

[9] Chapneys *v.* Peck, 1 Stark. 404.

the customer at a certain time had *no funds* in the banker's hands, without calling the clerks who made the entries therein.[1] An entry of dishonor of a bill, made by a notary's clerk in the usual course, of business, is evidence of the fact of dishonor, after the clerk's decease.[2]

Upon the same principle, *contemporaneous* entries by a deceased shopman or servant in his master's books, in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery.[3] But an entry of a hiring at certain wages, in the deceased master's private book, with a memorandum of payment, is admissible evidence *inter alios*,[4] for it was neither his duty to make it, nor was he interested in making it in the proper sense of "interest." An entry purporting to be the substance of a lease made by the lord of a manor, contained in a book of his steward, 200 years old, is not evidence of the lease either as secondary evidence or as an entry made in the course of duty or business.[5]

In order to render such entries evidence, it must appear that the shopman is dead; that he is abroad, and not likely to return, is not sufficient.[6] The entry, too, must be by the person who actually did the act recorded by it. Thus, an entry of goods sold, made by a witness on the dictation of A., who had received information of the sale from B., a servant of the vendor, whose duty it was to report the sale to A., was rejected as evidence of the sale, though A. and B. were both dead.[7] Where a person employed to serve a notice on R. brought back the duplicate notice indorsed as so served, but stated orally that he had delivered it to W.,

[1] Furness *v.* Cope, 5 Bing. 114.

[2] Poole *v.* Dicus, 1 N. C. 649. In Marks *v.* Lahee, 3 N. C. 408, an entry by a deceased clerk of the plaintiff's attorney, in a day-book, stating a tender by him and refusal by the defendant, was held evidence of a replication to that effect; but there was a previous entry of a *receipt* by him of the money for the purposes of such tender.

[3] Price *v.* Torrington, Ld., 1 Salk. 285; Patteshall *v.* Turford, 3 B. & Ad. 898.

[4] R. *v.* Worth, 4 Q. B. 132.

[5] Padwick *v.* Skinner, 3 Exch. 84. See also Doe d. Padwick *v.* Wittcomb, 6 Exch. 601.

[6] Cooper *v.* Marsden, 1 Esp. 1.

[7] Brain *v.* Preece, 11 M. & W. 773.

it was held that, after the death of the person serving, it was not competent to give in evidence his oral statement of service on W.[1] An entry in a letter-book kept by a deceased clerk in the course of duty is secondary proof of the contents of the letter sent, and of the posting of it, if that was the course of business.[2]

By stat. 7 Jac. 1, c. 12, s. 1, it was provided that the shop-book of a tradesman shall not be evidence in any action for wares delivered, or work done, above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt or obligation of the debtor for his said debt, or shall have brought against him, or his executors, some action for the said debt within a year next after the delivery of the wares, or the work done. By sec. 2, the act was not to extend to traffic, or dealing between merchant and merchant, merchant and tradesman, or tradesman and tradesman, for anything within the compass of their mutual trades and merchandise. This statute seems to recognize the previous admissibility of shop-books. But the act was never of much practical importance, and the admissibility of such books at common law, in favor of the tradesman, must generally depend on the principles already referred to.[3]

Although an entry made in the course of office, reporting facts necessary to the performance of a duty, may be admissible, yet the statement in it of other extraneous circumstances, however naturally they may find a place in the narrative, is no proof of these circumstances. Thus, a return by a sheriff's officer of an arrest at a specified place is not evidence, *inter alios*, of the *place* of arrest.[4] This case illustrates a distinction between declarations against interest and declarations made in the course of office or business. The former declarations are evidence of all the facts stated; the latter, only of the facts which it was the business of the of-

[1] Stapylton *v.* Clough, 2 E. & B. 933.

[2] Pritt *v.* Fairclough, 3 Camp. 305; Hagedorn *v.* Reid, ib. 379.

[3] Symonds *v.* Gas Light Co., 11 Beav. 283.

[4] Chambers *v.* Bernasconi, 1 C., M. & R. 347.

ficer or writer to state.[1] So, entries against interest are evidence, whensoever made. The latter entries must generally be contemporaneous with the act done.[2]

[1] Percival *v.* Nanson, 7 Exch. 1.

[2] Smith *v.* Blakey, L. R., 2 Q. B. 326. In Edie *v.* Kingsford, 14 C. B. 759; 23 L. J., C. P. 123, a distinction is incidentally made *per cur.* between declarations "in the course of *business*," and declarations "in the course of *duty*;" but the cases cited recognize no such distinction.

CHAPTER XI.

MEMORANDA. — WHEN MAY BE EVIDENCE.

SECTION.

129. How may be used as Evidence.
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132. Witness need not have Recollection Independent of.
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Sec. 129. Memorandum, how may be used as Evidence.

Memoranda of facts and circumstances, made by an eye witness, at the time of the occurrence, *and which he swears to be correct*, are not generally admissible in evidence,[1] except where they are made in the due course of business,

[1] People *v.* Elyea, 14 Cal. 144; Gilmore *v.* Wilson, 53 Penn. St. 194; Carr *v.* Stanley, 7 Jones (N. C.) L. 131; Urkett *v.* Coryell, 5 W. & S. (Penn.) 60; Tandy *v.* Masterton, 1 Bibb (Ky.) 230. "Check slips" made in the regular course of business in transhipping goods from one car to another are admissible to aid a witness making them, in recollecting the number of the cars. Shriedley *v.* State, 23 Ohio St. 130. The certificate of a physician who examined a person for an insurance upon his life is admissible in evidence, when he acted by the consent of both parties as examiner, although he was not the regular examining surgeon of the company, because in such a case his certificate partakes of the nature of an original document. Mutual Benefit Life Ins. Co. *v.* Cannon, 48 Md. 264. See also Bailey *v.* Burchard, 62 Me. 168, where a sealed bill made by the person agreed upon as the parties to make it was held admissible, although not sustained by the oath of the person making it, there being no proof that any omissions were made or that any fraud was practiced. Private memoranda made by a person in a pass book or elsewhere are not admissible in his favor. Golding *v.* Orcutt, 44 Vt. 541. Nor are newspaper accounts of what a person said upon the occasion of the happening of an injury to him through a railway casualty. Downs *v.* N. Y. Central R. R. Co., 47 N. Y. 82.

and the person making them is dead.[1] Thus, in the case last cited, a memorandum in the handwriting of a deceased note clerk of a bank that he delivered a certain notice was held admissible to prove the fact of notice. So memoranda made by a deceased sheriff, in a book kept by him for that purpose, were held to be admissible in a suit between third parties, where the entries were made by him in the course of his official duty, and were against his interest at the time.[2] So, when the identity of lands sold for taxes as unseated is in question, manuscript books containing memoranda signed by various persons who had been deputy surveyors, found in the office of a deceased deputy surveyor, are admissible if they appear to be such memoranda as the deputy surveyors ought, by the nature of their duty, to have made.[3] But

[1] Bank of United States *v.* Davis, 4 Cr. (U. S. C. C.) 533. In Welsh *v.* Barrett, 15 Mass. 380; North Bank *v.* Abbott, 13 Pick. (Mass.) 465; Shone *v.* Wiley, 18 id. 558; and Washington Bank *v.* Prescott, 20 id. 339, such entries were held admissible, not only when the messenger is dead, but also when he has absconded, or from any cause his testimony cannot be obtained. But see Avery *v.* Avery, 49 Ala. 193, where the true rule is stated to be that a memorandum made by a person deceased is only admissible when made by him in the due course of business, and as facts which, if living, he would be competent to testify. Contemporaneous entries of acts and occurrences, as well as copies of instruments, if made in the course of business, or where they would naturally be looked for, are often received as evidence, especially where they are sustained by other evidence. Briggs *v.* Henderson, 49 Mo. 531. Entries made upon a bill of lading made by agents of a railroad company, whose duty it is to indorse thereon the condition of the goods when received, are held to be admissible in Georgia. Evans *v.* Atlanta, &c., R. R. Co., 56 Ga. 498. See also Kerr *v.* Ferrish, 52 Miss. 101, where a pencil memorandum upon an official register or list of lands designating one lot as having been sold to K., was held admissible as tending to support the title of one claiming under K. In Cabat *v.* Walden, 46 Vt. 11, a book containing an account of expenditures of overseers of the poor, *which it was their duty to make*, was held to be admissible in favor of the town to prove such expenditures.

[2] Field *v.* Boynton, 33 Ga. 239. A written memorandum, made by an officer in the course of his official duty, which is against his interest, is admissible after his death, as well of the facts against his interest as of other collateral and incidental facts and circumstances contained in it, and that, too, irrespective of the question whether any priority exists between the officer and the party against whom it is offered. Livingston *v.* Anoux, 56 N. Y. 507.

[3] Russell *v.* Werntz, 24 Penn. St. 337.

while memoranda made by a person who is still living are not admissible, for want of being verified on oath or its equivalent, or traceable to the party against whom it is offered, the benefit of its *permanence* is not always lost to justice. Thus a witness who has drawn up a written narrative, or made a written memorandum of a matter or transaction, may in many cases use it while under examination as a script to refresh his memory.[1] Thus a witness may refer to his account

[1] Sandwell *v.* Sandwell, Comb. 445; Holt, 295; Church *v.* Perkins, 3 T. R. 749; Burton *v.* Plummer, 2 Ad. & El. 341; Beech *v.* Jones, 5 C. B. 696; Smith *v.* Morgan, 2 Moo. & R. 257; 2 Phill. Ev. 480 *et seq.*, 10th ed.; Dyer *v.* Best, 4 H. & C. 189; Howland v. Willetts, 5 N. Y. 219; Huff *v.* Bennett, 6 N. Y. 237; Halladay *v.* Marsh, 3 Wend. (N. Y.) 142; Green *v.* Disbrow, 7 Lans. (N. Y.) 381; Gilbert *v.* Sage, 5 id. 290; Marclay *v.* Shultz, 29 N. Y. 351; Philbin *v.* Patrick, 6 Abb. Pr. (U. S.) 284. The English rule is, that a witness may use a memorandum, or any book or paper, to refresh his memory if he can afterwards swear to the fact from recollection; but if he cannot so swear otherwise than as finding it in the book, then it must be produced. Manghan *v.* Hubbard, 2 M. & Ry. 5. In this country, however, a memorandum is never evidence *per se* of the facts stated in it, but may be used by the witness to refresh his memory. Courtnay *v.* Com., 5 Rand. (Va.) 666; Farmers' Bank *v.* Whitehall, 16 S. & R. (Penn.) 90; Cummings *v.* Fisher, Anth. (N. Y.) 1. Where an action was brought for goods sold, and the plaintiff offered proof that the entries in his books, charging the defendant with the goods, were made by his clerk, who had gone to the West Indies, held that such evidence was not competent to establish the claim. Kenedy *v.* Fairman, 1 Hayw. (N. C.) 458; Whitefield *v.* Walk, 2 id. 24. So, where the age of a defendant had been written in a Bible, held that this memorandum was not the best evidence, and the age might be proved by parol. ——— *v.* ———, 1 McCord (S.C.), 164; Butler *v.* Young, 3 Bibb (Ky.), 520; Berry *v.* Waring, 2 H. & G. (Md.) 103. See *post*, notes And a memorandum by a district attorney, of the confession of a prisoner, need not be produced; but he may give oral evidence of such confession. Patton *v.* Freeman, Coxe (N. J. Eq.), 113. In South Carolina, the testimony of a witness who swears positively from written memoranda, though they do not call to his memory the facts, is held not only admissible, but better evidence than unaided recollection. Pearson *v.* Wightman, 1 Rep. Const. Ct. (S. C.) 344; Haig *v* Newton, id. 423; Sharp *v.* Bingley, id. 373. See Brown *v.* Anderson, 1 Mon. (Ky.) 198; Guy *v.* Mead, 22 N. Y. 462. The general principle, however, deducible from a majority of the cases in this country is, that the witness may inspect notes or memoranda to refresh his memory, and then, if he can with a safe conscience swear to the facts independent of the memorandum, in other words, if he is then able to remember the facts, he may testify. He refreshes his memory from his memoranda, and then swears from recol-

books, or his cash book,[1] or to letters written by himself relating to the transaction,[2] or even to a bill of particulars or memorandum not made by himself, if upon reading it he is then able to recollect and testify to the facts contained therein.[3] If the original memorandum is destroyed, a witness may refer to a copy thereof made by himself or under his direction and supervision.[4] Thus, in the case last cited,

lection; but he will not be permitted to read his memoranda to the jury. Juniata Bank *v.* Brown, 5 S. & R. (Penn.) 87; Robertson *v.* Lynch, 18 John. (N. Y.) 451; Howland *v.* Sheriff of Queens Co., 5 Sandf. (N. Y.) 219; Wood *v.* Ambler, 8 N. Y. 170.

[1] Meacham *v.* Pell, 51 Barb. (N. Y.) 65; Dinggs *v.* Smith, 4 J. & S. (N. Y. Sup. Ct.) 283. But if he has first sworn positively to the facts, he cannot refer to his books for the purpose of corroborating his testimony, as in that case his testimony and memory is wholly independent of the memoranda. Sackett *v.* Spencer, 29 Barb. (N. Y.) 180. But see Townsend M'f'g Co. *v.* Foster, 41 N. Y. 620, where it was held that, where a memorandum of what took place at a certain interview was made on the evening of the day when it transpired, and it corroborates the testimony given by the witness, it may be given for that purpose. So, in McCormick *v.* Penn., &c., R. R. Co., 49 N. Y. 303, it was held that, after proof of the facts contained in a memorandum, the paper itself may be read to the jury.

[2] Lewis *v.* Ingersoll, 1 Keyes (N. Y.), 347. And if the original memorandum is lost, he may refresh his memory, if the copy was made by himself or under his supervision, from a copy of it. Felkins *v.* Baker, 6 Lans. (N. Y.) 516.

[3] Smith *v.* Randall, 3 T. & C. (N. Y.) 798; Bogue *v.* Newcomb, 58 N. Y. 674; aff'd 1 T. & C. (N. Y.) 251. In Hotchkiss *v.* Mather, 48 N. Y. 478, it was held that the plaintiff, a witness upon the stand, might refresh his memory from a memorandum made by the defendant.

[4] Filkins *v.* Baker, 6 Lans. (N. Y.) 516; Green *v.* Disbrow, 7 id. 381. In State *v.* Collins, 15 S. C. 373, a witness in a capital case who was an employee in a hospital, was permitted to refresh his memory by referring to a contemporaneous record of the hospital, following Berry *v.* Jourdin, 11 Rich. (S. C.) 67, and distinguishing the case from Furman *v.* Peay, 2 Bailey (S. C.), 394; State *v.* Cardoza, 11 S. C. 239; and Bank *v.* Zorn, 14 id. 444. See also Cameron *v.* Blackman, 39 Mich. 108. In Cooper *v.* State, 59 Miss. 267, a witness who was an old man, whose memory was impaired, was permitted to refresh his memory from a paper written by him at the time. In State *v.* Miller, 53 Iowa, 154, it was held that a witness might refresh his memory by referring to the notes of his testimony taken before the grand jury. See Memphis, &c., R. R. Co., *v.* Maples, 63 Ala. 601, where it was held that before a witness can refresh his memory from books or papers it must be shown that he either wrote the entries or had knowledge of their accuracy, even though the books, etc., were all the time in his custody. See also Acklin *v.* Hickman, 63 Ala. 494, where it was

the plaintiff, who was a foreman and cutter in the defendant's shop, kept the account of his work upon slips of paper. These slips he took home with him every week, and every Saturday night he would figure up the number of hours he had worked, and his wife would set it down for him upon another paper, and the original slips were destroyed. He refreshed his memory from the copy made by his wife, and the court held that it was proper for him to do so, as under the circumstances the copy might be considered as the original memorandum made at the time by himself, or by his direction, which, in the language of MILLER, P. J., "is the same thing under the circumstances as if he had personally done it." In another New York case,[1] the plaintiff was tried and convicted of an assault with intent to kill. Upon the trial a police surgeon testified that when the complainant was brought to the station-house, he made a statement to him as to the persons who had assaulted him; that the statement was written down upon a slate; that he thought names were mentioned in it, but could not remember what they were. A sergeant was then called, who testified that the slate was handed to him by the surgeon; that he copied it into the station-house blotter, and then rubbed out what was on the slate. It was held that the statement contained in the blotter was properly received in evidence, as the original memorandum had been erased from the slate and destroyed. In this case the rule is carried much further than the English cases have gone. In those cases the rule seems to be, that a witness may refresh his memory by a copy of a memorandum *when after looking at the copy he is able to swear positively to the facts stated therein from his own recollection, or that he knew the facts to be as stated therein at the time.*[2]

held that a witness may refresh his recollection from a memorandum when it was made by him, or known and recognized by him as stating the facts truly, when after such examination he can testify to the facts as a matter of independent recollection.

[1] Adams *v.* The People, 3 Hun (N. Y.), 654.

[2] Duchess of Kingston's Case, 20 How. St. Tr. 619; Tanner *v.* Taylor, cited in Doe *v.* Perkins, 3 T. R. 754. In Howard *v.* McDonough, 77 N. Y. 592, the court laid down the rule as to the use of memoranda as follows: "The law as to the use of memoranda by witnesses while testifying is quite well settled in this State. 1. A witness may, for the purpose of

In any event, it is questionable whether the copy should be used, so long as the original is in existence, and its

refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. 2. When a witness has so far forgotten the facts that he cannot recall them, even after looking at a memorandum of them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and which he believes to be correct, such memorandum, in his own handwriting, may be received as evidence of the facts therein contained, although the witness has no present recollection of them. 3. Memoranda may be used in other cases which do not precisely come under either of the foregoing heads. A store of goods is wrongfully seized, and an action is brought to recover for the conversion. There are thousands of items. No witness could carry in his mind all the items and the values to be attached to them. In such a case, a witness may make a list of all the items and their values, and he may aid his memory while testifying by such list. He must be able to state that all the articles named in the list were seized, and that they were of the values therein stated, and he may use the list to enable him to state the items. After the witness has testified, the memorandum which he has used may be put in evidence, not as proving anything of itself, but as a detailed statement of the items testified to by the witness. The manner in which the memorandum, in such a case, may be used is very much in the discretion of the trial judge. He may require the witness to testify to each item separately, and have his evidence recorded in the minutes of the trial, and then the introduction of the memorandum will not be important; or he may allow the witness to testify quite generally to the items and their values, and receive the memorandum as the detailed result of his examination, leaving to the adverse party a more minute cross-examination. Without the use of a memorandum in such cases, it would be difficult, if not impossible, to conduct a trial involving the examination of a large number of items. Driggs *v.* Smith, 36 N. Y. Superior Court, 283; McCormick *v.* Penn. Cent. R. R. Co., 49 N. Y. 303; Acklin *v.* Hickman, 63 Ala. 594; 35 Am. Rep. 54. In Com. *v.* Ford, 130 Mass. 64, it was held that a newspaper reporter, called as a witness, may refresh his memory as to an occurrence in his presence by referring to a printed report of it, written by him at the time. "We are of opinion," said ENDICOTT, J., "that the witness should have been allowed, for the purpose of refreshing his memory, to look at the printed report, which he stated, as of his own knowledge, was printed substantially as made by him. It was not contended that the written or printed report or any portion of its contents could be put in evidence. It was clearly incompetent, in any aspect of the case, as presented. The rule, therefore, that to prove by oral testimony the contents of a paper, relied on as evidence, it is necessary first to show that it has been lost or destroyed, or that upon diligent search it cannot be found, has no application to this case. If

absence unexplained; *for the rule requiring the production of the best evidence is equally applicable, whether a paper*

such rule did apply, it is difficult to see why it was not competent for the defendant to prove that it was the custom in the Herald office to destroy all such original written reports after printing them; but that question it is not necessary to consider."

In order to refresh the recollection of a witness, *it is not important that the paper, book, or memorandum should have been written or printed by the witness himself, or that it should be an original writing. It is sufficient if he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed.* Upon inspecting it, he can state the facts if thereby called to his recollection. Chapin *v.* Lapham, 20 Pick. (Mass.) 467.

In Coffin *v.* Vincent, 12 Cush. (Mass.) 98, which was trespass for taking and carrying away certain sheep, the defendants attempted to prove that the sheep were taken by them as field-drivers, while running at large, and for that cause were taken up and impounded. To prove this, they called a witness to show the contents of the notice posted up by them as field-drivers, which notice had been lost or destroyed; and in testifying to its contents it was held that the witness could refresh his recollection by referring to a form of such notice, which, though not made by himself, he had compared with the notice posted up, and found them to correspond. In that case, the general rule applicable here is well stated, though the case differs from this in the fact that the contents of an original paper were sought to be proved, and therefore it was necessary to show that it had been lost. In this case, the original written report of the witness could not have been used in evidence. In Kensington *v.* Inglis, 8 East, 273, a license to trade with the enemy had been lost. A witness was called, who had made an entry of it in his memorandum book for the private information of himself and his employer, which book was not produced in evidence; and it was held that the witness might testify to the contents of the license from memory, although the book was not produced, for if in court, it would not have been evidence *per se*, but could have been used by the witness only to refresh his memory.

The case most nearly resembling the case at bar is Horne *v.* Mackenzie, 6 Cl. & Fin. 628. A surveyor made a survey and report, which he furnished to his employers, and being called as a witness he produced a printed copy of this report, on the margin of which he had two days before, to assist him in giving his explanation as a witness, made a few jottings. The printed report had been made up from his own original notes, of which it was in substance, though not in words, a transcript, and it was held that he might look at the printed copy to refresh his memory. In Rex *v.* Duchess of Kingston, 20 How. St. Tr. 355, 619, a witness was allowed to use a copy of his own memorandum made by another person in his presence. In Burton *v.* Plummer, 2 Ad. & El. 341, a clerk of a tradesman entered the transactions in trade, as they occurred from his own knowledge, and the tradesman copied them into a ledger in the presence of the clerk, who checked them as they were copied. It was held that

is produced as evidence in itself, or is merely used to refresh the memory.[1] If the copy is an imperfect extract, or is not proved to be a correct copy, or if the witness has no *independent* recollection of the facts narrated therein, the original must be used.[2] In an English

the clerk might use the entries in the ledger to refresh his memory, though the waste-book was not produced nor its absence accounted for, the entries in the ledger having been made as by the clerk himself. It was in the nature of the duplicate original, and is similar to the case at bar, where the written report of the witness was printed in the newspaper, to his own knowledge substantially as made by him. See also Burrough *v.* Martin, 2 Camp. 112; Wood *v.* Cooper, 1 Car. & K. 645; Doe *v.* Perkins, 3 T. R. 749; Regina *v.* Langton, 2 Q. B. D. 296.

In Huff *v.* Bennett, 6 N. Y. 337, it was said: "It is not necessary that such writing should have been made by the witness himself, or that it should be an original writing, provided after inspecting it he can speak to the facts from his own recollection." So a witness may be allowed to refresh his memory from notes taken by counsel at a former trial; Regina *v.* Philpotts, 5 Cox C. C. 329; or from his disposition, or a copy of the same. Smith *v.* Morgan, 2 Mood. & Rob. 257; George *v.* Joy, 19 N. H. 544. And in Henry *v.* Lee, 2 Chit. 124, where a witness was allowed to refresh his memory from a document not written by him, Lord Ellenborough said: "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum was written by himself; for it is not the memorandum that is the evidence, *but the recollection of the witness.*" Com. *v.* Jeffs, Mass. S. C. 1882; Queen *v.* Langton, 2 Q. B. Div. 296; State *v.* Collins, 15 S. C. 373; State *v.* Rawls, 2 N. & McCord (S. C.), 331; Berry *v.* Jordon, 11 Rich. (S. C.) 67. But see State *v.* Cordoza, 11 S. C. 239; Bank *v.* Zorn, 14 id. 444. In South Carolina it seems that the memoranda must be contemporaneous with the happening of the event. State *v.* Collins, *ante;* Ballard *v.* Ballard, 5 Rich. (S. C.) 495.

[1] Burton *v.* Plummer, 2 Ad. & El. 344. See also Jones *v.* Stroud, 2 C. & P. 196.

[2] Doe *v.* Perkins, 3 T. R. 749, explained by Patteson, J., in 2 Ad. & El. 215; R. *v.* Hedges, 28 How. St. Tr. 1367, *per* Lord Ellenborough; Solomons *v.* Campbell, cited 1 St. Ev. 177, 178, n., *per* Abbott, C. J. Original entries and memoranda, with a suppletory oath, may be read in evidence, though not made in the course of business, and though the witness has no recollection as to the facts they recite. Thus, the question being whether an indorsement of payment on a note was made in time to take the case out of the Statute of Limitations, a written computation made at a subsequent date, with the purpose of determining the amount then due, and in which no such payment was included, was held admissible with the oath of the party making it. Guy *v.* Mead, 22 N. Y. 462. The question being as to the length of credit given, the defendant, on notice from the plaintiff, produced the original, the bill of sale, on which was minuted the time of

case,[1] the plaintiff's clerk, being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a ledger. The transactions in trade had been noted by the clerk in a waste-book as they occurred, and the plaintiff, day by day, had copied the entries into the ledger, each entry being at the time checked by the clerk. Under these circumstances the court regarded the ledger as an original, and allowed the witness to refresh his memory thereby without accounting for the absence of the waste-book. And in another case,[2] where a surveyor was permitted to refresh his memory by a printed copy of a report furnished by him to his employers, and compiled from his original notes, of which it was substantially, though not verbally, a transcript, the report seems to have been treated in the light of an original document; and although it contained some marginal

credit. This evidence was held not to be overcome by the testimony of the plaintiff's book-keeper, which tended to show that he had made such memoranda without instructions from the plaintiff so to do. Leeds *v.* Dunn, 10 N. Y. 469. The plaintiff having testified that a certain agreement was made in the presence of H., and that H. at the time made a written statement of the mode of settlement of the parties' accounts, upon the basis of which such agreement was made, it was held that it was competent for the plaintiff to introduce in evidence, as corroborative of his own testimony, such written statement. Norton *v.* Downer, 33 Vt. 26. A memorandum, though not signed by the party, is admissible in connection with his admissions that it contained the contract. Hosford *v.* Foote, 3 Vt. 391. If a question of time is material, a writing which the plaintiff testifies that he drew up in connection with a settlement with the defendant, and showed to the latter, who made no objection to it, is admissible in evidence to fix the time in dispute, although it is not found that the paper was in fact shown to the defendant, or that the date upon it, which tends to fix the time, is correct. Goodnow *v.* Parsons, 36 Vt. 46. A memorandum of an oral agreement, written and signed by the plaintiff upon his private memorandum book, for his own private reference, is not conclusive upon any one, but is at most a piece of evidence not admissible in favor of the plaintiff, except when accompanied by proper parol proof, and not competent against him except as an admission, the force of which is to be determined by proof of the circumstances under which it was made. Stannard *v.* Smith, 40 Vt. 513.

[1] Barton *v.* Plummer, 2 Ad. & El. 344.

[2] Horne *v.* McKenzie, 6 Cl. & Fin. 628, 630, 645. See also Topham *v.* Macgregor, 1 C. & Kir. 320, where the writer of an article in a newspaper was allowed to refresh his memory by the paper, his MS. being proved to be lost.

notes, made only two days before, it was still allowed to be used, these notes consisting of mere calculations, which the witness, if time were given him, could repeat without their aid.

Sec. 130. Memorandum should be made by Witness.

As a general rule, before a witness can refresh his memory by looking at memoranda, it seems to be further necessary that they should have been made either *by the witness* himself, or *by some person in his presence*,[1] or that he should have examined them while the facts were fresh in his memory, and should then have known that the particulars therein mentioned were correctly stated. In accordance with the last part of this rule, a witness has been allowed to refer to a log-book, which, though not written by himself, had, from time to time, and while the occurrences were recent, been examined by him.[2] So, where it has been material to prove the date of an act of bankruptcy, the court has several times permitted witnesses to refer to their depositions, taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them.[3] So, if the witness has checked an entry made by

[1] Duchess of Kingston's Case, 20 How. St. Tr. 619.

[2] Burroughs *v.* Martin, 2 Camp. 112. In Gilchrist *v.* Brooklyn, &c., Association, 39 N. Y. 495, it was held that, in order to render a memorandum admissible, the witness should identify the handwriting as his own. Thus, in that case, in an action to recover the purchase price of a quantity of potatoes, alleged to have been purchased by the plaintiff as agent for the defendant, and shipped to the latter by canal, the defendant claimed a deficiency in quantity as shown by the weight of the boat and cargo, at a weigh-lock upon the canal. The defendant called a witness, who testified that, in his belief, the entry in the weigh-book was in his handwriting, and, if so, he weighed the boat, and it was weighed correctly; he then stated the weight from the entry. On cross-examination it appeared that the witness had no connection with the weighing lock, but occasionally weighed boats; that he could not swear that the entry was in his handwriting, and that he had no recollection of the matter independent of the entry. Lines were drawn over the entry in the book, and an entry appeared under date two days later, in another hand, of the weight of the boat. The plaintiff moved to strike out the evidence as to weight, which was refused, which the court held to be error.

[3] Smith *v.* Morgan, 2 M. & Rob. 257; Wood *v.* Cooper, 1 C. & Kir.

another person ;[1] or has actually seen money paid and a receipt given ;[2] or has read a memorandum to a party who has assented to its terms ;[3] in all these, and similar cases, he will be allowed to look at the document itself, for the purpose of refreshing his memory as to the facts mentioned therein. In some cases a greater latitude has prevailed, and witnesses have been allowed to refresh their memories from the brief notes of counsel taken at a former trial, provided they could afterwards speak from recollection, and not merely from the notes.[4]

Sec. 131. Memorandum may be used, although its Contents would not be Admissible.

As a writing, used to refresh the memory, does not thereby become evidence of itself, it is *not necessary* that it should even be *admissible ;* and therefore, a receipt which cannot be read for want of a stamp, may yet be referred to by the witness in giving his evidence.[5] Neither is it essential, when notes are used by a witness who is called to prove a conversation, a speech, or the like, that they should contain a *verbatim* account of all that was uttered. Thus, where it appeared that a short-hand writer had taken a *verbatim* note of such parts of an address as he deemed material, and was merely able to swear to the *substantial correctness of the remainder*, he was permitted to read the whole, although it was strongly urged that, as by the witness's own showing the note was a *partial* one, the fullness, and consequent accuracy, of which rested on his private opinion of the materiality of what was spoken, he was not entitled to use it at all, but was bound to depend on his memory alone.[6] If the witness has become

645; Vaughan *v.* Martin, 1 Esp. 440.

[1] Burton *v.* Plummer, 2 Ad. & El. 341.

[2] Rambert *v.* Cohen, 4 Esp. 213.

[3] Bolton *v.* Tomlin, 5 Ad. & El. 856; Jacob *v.* Lindsay, 1 East, 459; R. *v.* St. Martin's, Leicester, 2 Ad. & El. 210.

[4] Lawes *v.* Reed, 2 Lew. C. C. 152, citing Balme *v.* Hutton as a similar case. See also Henry *v.* Lee, 2 Chitt. 124.

[5] Maugham *v.* Hubbard, 8 B. & C. 14; Jacob *v.* Lindsay, 1 East, 459; Rambert *v.* Cohen, 4 Esp. 213, *per* LORD ELLENBOROUGH; Catt *v.* Howard, 3 Stark. 3, *per* ABBOTT, C. J.

[6] R. *v.* O'Connell, Armstr. & Trev. 165–167.

blind, or from other cause is unable to read the entries, the paper may be read over to him, in order to excite his recollection.[1]

Sec. 132. Witness need not have Recollection, Independent of the Memorandum.

In order that a document may be used as the refresher of memory, it is by no means necessary that the witness, after having seen it, should have any *independent recollection* of the facts mentioned therein, or connected therewith; it is sufficient if he remembers that he has seen the paper before, and that, when he saw it, he knew its contents to be correct; or even if, entirely forgetting the circumstances themselves, and the fact of his having seen the paper, he can still, in consequence of recognizing his signature or writing upon it, vouch for the accuracy of the memorandum, or swear to the particular fact in question.[2] Thus, where a clerk entered notes in a bill-book at the time when they were delivered and in the due course of business, and upon being called as a witness he was unable to testify, independently of the entry, what the contents of the notes were, it was held that the entries were admissible.[3] So, where an agent, who had made

[1] Catt *v.* Howard, 3 Stark. 3, *per* ABBOTT, C. J.; Vaughan *v.* Martin, 1 Esp. 440, *per* LORD KENYON.

[2] Guy *v.* Mead, 22 N. Y. 462; Marclay *v.* Shultz, 29 id. 346; Meacham *v.* Pell, 51 id. 65; Wilde *v.* Hexter, 50 Barb. (N. Y.) 448; Heath *v.* West, 26 N. H. 191. If a witness, upon looking at a memorandum made by him at the time, is able from it to testify to the delivery of goods, the testimony is admissible, although he has no present recollection of the transaction except that afforded by the memorandum, which is not itself competent evidence. Dugan *v.* Mahoney, 11 Allen (Mass.), 572.

[3] Kennedy *v.* Crandall, 3 Lans. (N. Y.) 1, MILLER, P. J., saying: "These entries were made at the time when the note was given, and tend strongly to corroborate the testimony of White, who relied upon the entries, and who would not swear positively that the words were not in the notes, independent of them. They were not in the nature of naked hearsay evidence or statements in writing of third parties, but entries of transactions made at the time by the clerk of the party in the regular course of business. In Marclay *v.* Shultz, 29 N. Y. 346, it was held to be competent to read an entry made by a witness of any fact material to the issues, if made at or near the time when the fact occurred, and he can swear it was made correctly. See also Guy *v.* Mead, 22 N. Y. 462; Halsey *v.* Sinsebaugh, 15 N. Y.

a parol lease, and entered a memorandum of the terms in a book, stated that he had no memory of the transaction but from the book, though on reading the entry he entertained no doubt that the fact really happened, it was held sufficient;[1] and a barrister, called to prove that a witness had materially varied his account since the last trial, has been allowed to refresh his memory by the notes on his brief, though he had no independent recollection of what took place on the former occasion.[2] So, where a banker's clerk is shown a bill of exchange, which has his own writing upon it, from which he knows and is able to swear positively that it passed through his hands; or a witness, from seeing his own signature to the attestation of a deed,[3] or to any species of document,[4] says that he is therefore sure that he saw the party execute it, this is sufficient proof of the execution, though he adds that

485, within the rule laid down in the authorities last cited. The bill-book introduced contained an original memorandum made by the witness when the facts stated transpired, and was clearly admissible evidence." See also Hildreth *v.* Lowell, 11 Gray (Mass.), 345; Briggs *v.* Rafferty, 14 id. 525; Perkins *v.* Augusta, &c., Co., 10 id. 312. Where the maker and the holder of a note had mutually compared memoranda of the payments made on the note, in an action in favor of the estate of the deceased holder, such memorandum is admissible to prove payment. Meyer *v.* Reichardt, 112 Mass. 108.

[1] Haven *v.* Wendell, 11 N. H. 112; R. *v.* St. Martin's, Leicester, 2 Ad. & El. 210. See also Haig *v.* Newton, 1 Const. R. (S. C.) 423; Sharpe *v.* Bingley, id. 343; Maugham *v.* Hubbard, 8 B. & C. 14. In Bank of Tennessee *v.* Caman, 7 Humph. (Tenn.) 70, a notary's book contained an entry of protest for non-payment, and of notice given, and the notary stated that he was in the habit of making such entries at the happening of the event. It was held that *his belief, based upon such entry,* was good evidence, and that he need not swear that he had a recollection of the protest and notice.

[2] R. *v.* Guinea, Ir. Cir. R. 167, *per* CROMPTON, J.

[3] In Briggs *v.* Rafferty, 14 Gray (Mass.), 525, the freight books of a railroad company, supported by the testimony of the clerk who made the entries therein, that he had no doubt that the facts stated therein were correct, are admissible, although he swears that he has no personal recollection of the facts. See also Perkins *v.* Augusta Ins., &c., Co., 10 Gray (Mass.), 312; Parsons *v.* Manufacturers' Ins. Co., 16 id. 463.

[4] Maugham *v.* Hubbard, 8 B. & C. 16, *per* BAYLEY, J.; R. *v.* St. Martin's, Leicester, 2 Ad. & El. 213, *per* TAUNTON, J.; Russell *v.* Coffin, 8 Pick. (Mass.) 143; Jackson *v.* Christman, 4 Wend. (N. Y.) 277; Pigott *v.* Holloway, 1 Binn. (Penn.) 436; Smith *v.* Lane, 12 S. & R. 84; Clark *v.* Vorce, 15 Wend. (N. Y.) 193.

he has no recollection of the fact.[1] In a Massachusetts case,[2] in an action against an officer for not returning an execution, the docket of the attorney who took out the execution containing an entry that it was delivered to the officer on a certain day, taken in connection with the testimony of the attorney that he should not have made the entry unless he had delivered the execution or known of its delivery, was held sufficient evidence that the execution was so delivered, although he had no recollection of making the entry or delivering the execution; and the same rule was adopted where a constable made a return of the service by him of a notice issued by a city council, under an ordinance of the city, but where he swore that he had no recollection of the fact of service except from the circumstances that the return was written and signed by him;[3] and also as to entries made in the books of a bank by a cashier, treasurer or clerk, when the entries are identified by them, although they have no personal recollection of the facts.[4] So the freight books of a railroad company, supported by the testimony of the person making the particular entries therein that he has no doubt that the facts stated therein are correct, although he has no other knowledge thereof than the circumstance that the entry was made.[5]

And it seems that such entries are admissible, although the clerk or person called to verify them made only part of them, and has no personal recollection of the facts beyond that afforded by the entries, especially when the witness can swear that from the course of business he believes the entries state the facts.[6]

Sec. 133. When Opposite Party is Entitled to see the Memorandum.

In all cases where documents are used at the trial for the purpose of refreshing the memory of a witness, it is usual

[1] R. *v.* Hardy, 24 How. St. Tr. 824, *per* EYRE, C. J.

[2] Bunker *v.* Shed, 8 Met. (Mass.) 150.

[3] Hildreth *v.* Lowell, 11 Gray (Mass.), 345.

[4] Anderson *v.* Edwards, 123 Mass. 273; Jordan *v.* Osgood, 109 id. 457.

[5] Briggs *v.* Rafferty, 14 Gray (Mass.), 525; Adams *v.* Caulliard, 102 Mass. 167.

[6] Bradford *v.* Stevens, 10 Gray (Mass.), 379.

and reasonable, and if the witness has no independent recollection of the fact, it is necessary, that the *opposite counsel* should have an *opportunity of inspecting* them, in order that on cross, or re-examination, he may have the benefit of the witness's refreshing his memory by every part.[1] Neither is the adverse party bound to put in the document as part of the evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to;[2] but if he goes further than this, and asks questions as to other parts of the memorandum, it seems that he thereby makes it his own evidence.[3] If a paper is put into the hands of a witness merely to prove handwriting, and not to refresh his memory,[4] or if put into his hands for the purpose of refreshing his memory, but the question founded upon it utterly fail, the opposite party is not entitled to see it.[5]

Sec. 134. Memorandum itself only Admissible, when.

The rule is, that a memorandum itself only becomes evidence when the witness, after examining it, although able to swear that he knew it to be correct when he made it, is unable to state the particulars from recollection,[6] and when it is admitted it is subject to explanation, by the party making it, to the same extent that it would have been if the words had been spoken instead of written.[7]

[1] Howard *v.* Canfield, 5 Dowl. 417, *per* COLERIDGE, J.; R. *v.* St. Martin's, Leicester, 2 Ad. & El. 215, *per* PATTESON, J.; Sinclair *v.* Stevenson, 1 C. & P. 583, *per* BEST, C. J.; Lloyd *v.* Freshfield, 2 C. & P. 332; Dupuy *v.* Truman, 2 You. & Coll. Ch. 341.

[2] R. *v.* Ramsden, 2 C. & P. 604, *per* LORD TENTERDEN; Gregory *v.* Tavernor, 6 C. & P. 281, *per* GURNEY, B.

[3] Gregory *v.* Tavernor, 6 C. & P. 281. See Stephens *v.* Foster, 6 C. & P. 289.

[4] Russell *v.* Rider, 6 C. &. P. 416.

[5] R. *v.* Dunscombe, 8 C. & P. 369.

[6] Kelsea *v.* Fletcher, 48 N. H. 282. In Paine *v.* Sherwood, 19 Minn. 315, a memorandum containing several items of account was handed to the witness, who testified that he was able to state some of the items without looking at the memorandum, which was not original, nor the absence of the original accounted for. It was held that under these circumstances the memorandum was improperly permitted to be read in evidence.

[7] Rice *v.* Heath, 39 Cal. 609.

Sec. 135. Memoranda in which Person can have no Interest to Falsify.

There is a class of memoranda which, although not against interest, or made in the course of any business, are nevertheless admissible *from the very circumstance that the maker could have no interest to falsify the facts.* Thus it has been held that a record of the weather kept for a number of years at a State insane asylum is competent evidence to prove the temperature of the weather on a given day included in the record.[1] Such also would be the rule as to memoranda kept relative to the general state of the weather from day to day, upon a question whether it rained, snowed or was pleasant upon a certain day within the period included in the memoranda, because in reference to such matters there could be no interest to falsify, and the entries are made from personal observation and knowledge as to a matter about which there could be no doubt or difference of opinion, and cannot be expected to have any bearing upon the pecuniary interest either of the maker or any other person.

Sec. 136. Minutes of Testimony of Deceased Witness.

The minutes of testimony taken by an attorney of a witness, since deceased, are not admissible as evidence *per se*, but the attorney may testify as to the evidence given by the deceased witness, and will be permitted to use his notes as memoranda to refresh his memory ;[2] and the same is true as to the minutes of the presiding judge. He may testify as to what the witness said, using his minutes to refresh his memory, but his notes of the evidence are not *per se* evidence,[3] even though he is also dead.[4] But in many of the States it is held that when testimony is taken down upon the trial, and the person taking it down swears that it contains the evidence of the deceased, it may be read in evi-

[1] Armond *v.* Neasmith, 32 Mich. 231.

[2] Waters *v.* Waters, 35 Md. 357.

[3] Miles *v.* O'Hara, 4 Binn. (Penn.) 108; Daton *v.* Wallis, 1 N. & McCord (S. C.), 409. See "Testimony of Deceased Witness."

[4] Foster *v.* Shaw, 7 S. & R. (Penn.) 156.

dence ;[1] and in all cases, in those States where a stenographer is appointed by the court under a statute authorizing him to do so, the minutes of testimony taken by him would be admissible, if their genuineness is established.

[1] Moore *v.* Parsons, 9 M. & S. (Penn.) 51 ; Riggins *v.* Brown, 12 Ga. 271 ; Ashe *v.* De Rosetts, 5 Jones (N. C.) L. 299 ; Van Buren *v.* Cockburn, 14 Barb. (N. Y.) 118 ; Mineral Point R. R. Co. *v.* Keep, 22 Ill. 9.

CHAPTER XII.

BOOKS OF CORPORATION.

SECTION

137. Entries in Bank Books, when Admissible.

138. Books of Corporations generally, Rules as to Admission of.

Sec. 137. Entries in Bank Books, when Admissible.

Entries in the books of a deceased notary of the protest of a note by him are admissible to establish the fact of protest,[1] and such also seems to be the rule as to an entry made by a notary's clerk.[2] So, too, it has been held that memoranda made by a bank messenger of demands on promisors

[1] Nichols *v.* Webb, 8 Wheat. (U. S.) 326.

[2] Sutton *v.* Gregory, Peaks, 150. In Poole *v.* Dicas, 7 C. & P. 79, in an action against an indorser upon a bill of exchange after proof of the acceptance and indorsement, in order to prove presentment, a witness was called, who stated that he was, at the time when the bill became due, clerk to Mr. Harrison, a notary, and that it was brought there, and, according to the course of business, copied into a book; and that, in the margin of that book, besides the copy of the bill, was an entry in the handwriting of a person named Manning, who was then also a clerk of Mr. Harrison's, but who had since died. It was in the following words: "Out of town, and no orders.—C. J. M." The witness stated that the entry was in accordance with the course of business in the office, and purported to be the answer received by Manning on the presentment of the bill; and he added that such entries were almost always made on the same evening, immediately on the clerk's return, and never later than the following morning; and that the presentment of bills, according to the practice in London, was made after seven in the evening. On inspection of the bill a ticket appeared upon it, containing a similar entry to that in the margin of the book, but made, according to the testimony of the notary's clerk, by another clerk named Hawes, from the statement of Manning, which other clerk he believed was still living, and in business in the city. The bill was presented on Saturday, and a clerk of the plaintiff's proved that he put a letter to the defendant, giving notice of its dishonor, into the New Post-office, on the Monday. GARLEE, J., left the evidence to the jury, and upon a rule for a new trial, his ruling was sustained. See also Nichols *v.* Webb, 8 Wheat. (U. S.) 326; Nichols *v.* Goldsmith, 7 Wend. (N. Y.) 160; Halliday *v.* Martinett, 20 John. (N. Y.) 168.

and notices to indorsers, in respect to notes left for collection in the bank, are, after his decease, admissible to establish such demands and notices, upon the ground *that they were made in the due course of business*.[1] But it seems that an entry made in a bank book which goes to prove that the bank in that instance departed from a well-established usage, is not admissible in favor of the bank, even though the person making it is dead. Thus, it has been held that a book of original entries made by a deceased teller of a bank is not admissible to prove payments made to a depositor, where the custom was to pay money to depositors on checks.[2] But where the entry is of money paid on a check, and the check has been returned to the depositor, the rule would be otherwise, especially if the depositor, upon notice to do so, refused to produce the check. But entries made by third persons upon the books without the knowledge of the parties to the litigation are not proper evidence, because such books are not public records, and do not fall within any recognized class of written or documentary evidence.[3] But where the entries are made by a person having authority to make them, *in the due course of business*, and he is dead, they are evidence, in actions in favor of or against the bank, to prove either the deposit, loan or payment of money either to or

[1] Welsh *v.* Barrett, 15 Mass. 381. Where a bank messenger, in an action against an indorser, testified that he never had seen the note in suit, but that he gave the defendant notice of its non-payment, from a minute in a book kept at the bank, containing a minute description of notes becoming due there, the evidence was held to have been properly left to the jury. Weld *v.* Gorham, 10 Mass. 366; Shove *v.* Wiley, 18 Pick. (Mass.) 558; Washington Bank *v.* Prescott, 20 id. 339. In Bank of the United States *v.* Davis, 4 Cranch (U. S. C. C.), 533, a memorandum made by a deceased note clerk of the bank, that he had delivered a certain notice, was held admissible.

[2] Bank of Montgomery *v.* Plannett, 35 Ala. St. Cas. 178. But see Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, where it was held that in an action by a bank against a depositor for having overdrawn his account, the books of the bank are proper evidence to show receipts and payments of money, as the officers of the bank, to that extent, are to be deemed the agents of both parties; and if the clerk or person making the entry is dead, it is sufficient, to let in the books, that the entries are shown to be in his handwriting.

[3] Barnes *v.* Simmons, 27 Ill. 512.

by the bank. In a New York case,[1] the fact that a bank clerk surrendered a note upon erroneously receiving, as full payment, less than the amount due thereon, was established against the positive testimony of the maker thereof that the full amount was paid, by proof that the figures in the margin of the note had resembled such less sum ($210), more than the sum named in the body ($510), and had been torn off after the surrender and before the production of the note in court, and that the less amount was named in the bank notice and books, and that the bank balance sheet of the day of maturity showed an error in the day's transactions of only seven cents (instead of $200).[2] So, too, such books are evidence between the bank and its stockholders,[3] but not in actions between strangers,[4] unless it is shown that the

[1] Metropolitan Bank *v.* Smith, 4 Robt. (N. Y.) 229. In Ocean Nat. Bank *v.* Carll, 9 Hun (N. Y.), 239, the plaintiff, in order to prove that it was the *bona fide* holder of the note in suit, produced a discount register of the bank used at the time of the discounting of the note, which contained entries which tended to show that the note was discounted by the bank on the 31st of July, 1869, and proved that at that time one H. S. Murray was discount clerk of the bank, and that he was dead; that it was his business to make the entries, and that they were made in the usual course of business and were in his handwriting. The court held that the entries were admissible. "The rule is," said Bronson, J., in Brewster *v.* Doane, 2 Hill (N. Y.), 537, "that entries and memoranda made in the usual course of business by notaries' clerks and other persons may be received in evidence after the death of the person making them." Halliday *v.* Martinet, 20 John. (N. Y.) 168; Butler *v.* Wright, 2 Wend. (N. Y.) 369; Hart *v.* Wilson, 2 id. 513; Nichols *v.* Goldsmith, 7 id. 160. And in Sheldon *v.* Benham, 4 Hill (N. Y.), 129, where the entries made by the teller of the bank were offered in evidence, Bronson, J., said: "It is enough that he acted on this occasion in the usual course of his employment, and being dead, the entries which he made at the time were properly received in evidence. The rule for admitting them is not confined to entries made by public officers." Welsh *v.* Barrett, 15 Mass. 380. Where there is any reason for doubt, it is for the jury to say how much they prove. Davis, P. J., in Ocean Nat. Bank *v.* Carll, *ante*.

[2] In Snow *v.* Thomaston Bank, 19 Me. 269, entries made by the cashier, of the appropriation of money which the bank was to apply to the payment of notes belonging to it, are admissible to prove such appropriation, especially where it is shown that the party interested had seen the entries and did not object to them

[3] Merchants' Bank *v.* Rawle, 21 Ga. 334.

[4] Union Bank of Florida *v.* Call, 5 Fla. 409.

clerk who made the entry is dead or beyond the reach of process; nor is such book admissible to explain an entry in the private bank book of the opposite party, if the latter be produced only on notice given by the party offering the bank book,[1] or unless the entries upon the books of the bank can be verified by living witnesses who made them or furnished the data upon which they were made. Thus, in an action between two persons who have been in the habit of dealing with each other by notes and checks on a bank, the books of the bank are competent evidence to show what disposition has been made of such notes and checks, and how the proceeds have been applied and used. So the books of the bank, in which the parties to action have kept their accounts, are competent to prove that a check, given by the plaintiff to the defendant, had been carried to the credit of the latter in the books of the bank, and that the money had thus come into possession of the latter. And where it was in evidence that the defendant promised to send his daughter to the school of the plaintiff, and that she did attend the said school, it was held that the plaintiff's books of account were competent evidence to prove the amount of the service so rendered, and also the amount of books and stationery furnished to her for the purpose of instruction.[2]

In an action against a bank by a depositor, to recover on a special deposit, the books of the bank are admissible to show the character of the deposit. Thus in an action to recover from a bank a certain sum in gold, which the plaintiff claimed to have deposited in the defendant's bank, specially, an entry in the bank book of the plaintiff as follows: "1861, Dec. 30th, cash (coin) $3,000," was held admissible for the purpose of verifying the testimony of a witness, and of showing the nature of the particular entry, and it was also held that the plaintiff was not bound to put in evidence all the other entries in the books.

Pass books, in which the bank enters the deposits made by, as well as its payments to, a depositor, are evidence in an

[1] Philadelphia Bank *v.* Offiver, 12 S. & R. (Penn.) 49.

[2] Oliver *v.* Phelps, 20 N. J. L. 180.

[3] Oliver *v.* Phelps, 21 N. J. L. 597.

action between the bank and the depositor,[1] and it has been held that where entries of deposits are made by a clerk of the bank in the pass book when the deposit was made, and of which he had knowledge, they are conclusive on the bank, but if the deposit is made, and the entry is afterwards copied upon the pass book from the ledger, the bank is not concluded thereby, because the entry then stands as mere hearsay,[2] and is entitled to no more force than any ordinary copy. The books of a bank, like those of a merchant or shopkeeper, must be proved by the suppletory oath of some officer or agent of the bank, and are open to impeachment, not as a whole, but as to separate or particular items, and the degree of weight to be given them will depend upon the general accuracy with which they are shown to have been kept.[3] Entries in the books of a bank by a person since deceased, made in the usual course of business, and by one whose duty it was to make them, and who had no interest to misrepresent the facts, are admissible in evidence.[4]

Bank books, proved to have been regularly kept, and open to the inspection of the president of the bank, and probably examined by him, are admissible in evidence in an action against him by the receiver of the bank to recover of him on an account due the bank as it stood on their books; as also are the returns made by the bank to the bank commissioners during his presidency, which could not have been made up without including, with the amount of indebtedness from directors to the bank, the account against the president, and which were examined and allowed by him. The minute book of a bank directors' meeting, regularly kept by the cashier, and recognized by the president as authority, is good evidence of who were present and what was done by the board at a particular meeting, as between one who was president and director of the bank at the time

[1] McKanelin *v.* Bresslin, 8 Gray (Mass.), 177; Jermain *v.* Denniston, 10 N. Y. 276.

[2] Manhattan County *v.* Lydig, 4 John. (N. Y.) 377.

[3] Merchants' Bank *v.* Rawle, 7 Ga. 191.

[4] Wheeler *v.* Walker, 45 N. H. 355. That the books of a bank are evidence of the receipts and payments stated, see Union Bank *v.* Knapp, 3 Pick. (Mass.) 96.

the minute was made, and a receiver of the bank who represents the corporation.[1]

Sec. 138. Books of Corporations generally, Rules as to Admission of.

Where the books of a corporation, containing a record of its votes and acts, are kept by the proper officer, they are evidence of its acts and proceedings,[2] especially as between it and its stockholders,[3] and in actions against it,[4] as to prove

[1] Olney *v.* Chadsey, 7 R. I. 224; Alabama, &c., R. R. Co. *v.* Nabors, 37 Ala. 489.

[2] Ewings *v.* Speed, 5 Wheat. (U. S.) 420; Barrington *v.* Pittsburgh, &c., R. R. Co., 34 Penn. St. 358; McHorn *v.* Wheeler, 45 id. 32; Jefferson *v.* Stewart, 4 Harr. (Del.) 82; Highland Turnpike, &c., Co. *v.* McKean, 10 John. (N. Y.) 154; Hamilton, &c., Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157; Meadow Co. *v.* Shrewsbury Church, 22 N. J. L. 424; Fitch *v.* Packard, 5 Ill. 69; Penobscot R. R. Co. *v.* White, 41 Me. 512; Penobscot, &c., R. R. Co. *v.* Dunn, 39 id. 587; White Mountain R. R. Co. *v.* Eastman, 34 N. H. 124; Fitch *v.* Pinkard, 4 Swan (Tenn.), 69; People *v.* Oakland County Bank, 1 Doug. (Mich.) 282; Conn., &c., Life Ins. Co. *v.* Schenck, 94 U. S. 593; Hagar *v.* Cleveland, 36 Md. 476; Hudson *v.* Carman, 41 Me. 84.

[3] Chase *v.* Sycamore, &c., R. R. Co., 38 Ill. 215; Graff *v.* Pittsburgh, &c., R. R. Co., 31 Penn. St. 489; Wheeler *v.* Walker, 45 N. H. 355; Union Canal Co. *v.* Slayd, 4 W. & S. (Penn.) 393; New England Mfg. Co. *v.* Vandyke, 9 N. J. Eq. 498.

[4] Tuskaloosa *v.* Wright, 11 Ala. 230; N. E. Mfg. Co. *v.* Vandyke, 9 N. J. Eq. 498; Philadelphia, &c., R. R. Co. *v.* Hickman, 28 Penn. St. 318. The book of minutes of a corporation is only *prima facie* evidence of the correctness of the entries made in it, and the appearance of the entries may, of itself, raise so strong a suspicion against the regularity of the proceedings, that no weight will be given to them. Van Hook *v.* Somerville Manuf. Co., 5 N. J. Eq. 137. And they are not evidence of an agreement alleged to have been made by the stockholders as individuals, and not intended to bind the corporation. Black *v.* Shreve, 13 N. J. Eq. 455. Nor are they admissible against a member of the company, as evidence of his private contracts or dealings with the company. In respect to them, he is to be regarded as a stranger; nor indeed are they evidence in any case, unless it appears that they have been kept by the proper officer of the corporation. Haynes *v.* Brown, 36 N. H. 545. The receipt book of a corporation, containing entries of payments by a member, is evidence *against* the company, without producing the officer by whom they were countersigned, and are not to be rejected because they furnish evidence of other payments than those for which they are properly admissible in evidence. North America, &c., Assoc. *v.* Sutton, 35 Penn. St. 463. Entries of credit on the books for stock assigned, are worthless if founded on a transfer which did not discharge the assignor's liability. Hays *v.* Pittsburgh, &c., R. R. Co., 38 Penn. St. 81. Any person who saw the entries

the organization of the company,[1] to show who are stockholders,[2] to show that a call was made, and its amount,[3] to prove the acceptance of its charter or amendments thereto,[4] to show what resolutions were passed or votes were taken at a meeting either of the stockholders or directors,[5] and who were elected as directors, etc., of the corporation.[6] But the evidence afforded by the books is not conclusive, but may be impeached by any competent evidence.[7] While it is the general rule that books of a corporation are not evidence in actions in its favor against strangers,[8] yet this is not always true, and in some instances the rule is departed from. There are instances, however, in which the books of a corporation are not only admissible, but are also regarded as the best evidence of the facts to be established, even in actions between strangers. But the exception to the rule is limited. Thus, they are the proper evidence of its corporate acts, and while they are in existence and can be produced, parol evidence is inadmissible to prove the acceptance of the charter, or what persons are members of the corporation.[9] So where it

made in the corporation books, though he is not the secretary, can verify the books. St. Lawrence, &c., Co. *v.* Paige, 1 Hilt. (N. Y. C. P.) 430.

[1] Hudson *v.* Carman, *ante;* Grays *v.* Lynchburgh, &c., Turnpike Co., 4 Rand. (Va.) 578; Ryder *v.* Alton, &c., R. R. Co., 13 Ill. 516; Buncombe, &c., Turnpike Co. *v.* McCarson, 1 D. & B. (N. C.) 306; Wheeler *v.* Walker, 45 N. H. 355.

[2] In re St. George Steam Packet Co., 3 De G. & S. 31; Company of Carpenters, &c., *v.* Hayward, 1 Doug. 373; Collins *v.* Maule, 8 C. & P. 502. In an action to recover a subscription to a corporation, the subscription books are not only competent, but generally the only evidence by which the liability can be established. Marsh *v.* Colnett, 2 Esp. 665; Peake *v.* Wabash R. R. Co., 18 Ill. 88; Partridge *v.* Badger, 25 Barb. (N. Y.) 146.

[3] Barington *v.* Pittsburgh, &c., R. R. Co., 34 Penn. St. 358; White Mountain R. R. Co. *v.* Eastman, 34 N. H. 124.

[4] Coffin *v.* Collins, 17 Me. 440; Hudson *v.* Carman, *ante.*

[5] Montgomery R. R. Co. *v.* Hurst, 9 Ala. 513; Alabama, &c., R. R. Co. *v.* Nabors, 37 Ala. 489.

[6] Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194.

[7] Goodwin *v.* United States Annuity, &c., Co., 24 Conn. 591.

[8] Chase *v.* Sycamore, &c., R. R. Co., 38 Ill. 215; Hagar *v.* Cleveland, 36 Md. 476; Conn. Life Ins. Co. *v.* Schenck, 94 U. S. 593; Jones *v.* Trustees, &c., 46 Ala. 626.

[9] Coffin *v.* Collins, 17 Me. 440. If, however, no books have been kept, or if they are lost or destroyed, or cannot be obtained by the party having the affirmation of the issue, acceptance of the charter may be proved by the acts of the alleged

becomes important to show that a certain resolution was passed at a meeting of the stockholders or directors, the records, if any, must be produced, or notice to produce them must be given before secondary evidence of their contents will be admitted.[1] So where the charter provides that certain agents or officers shall be appointed by writing, the books of the corporation are admissible, in the absence of the

members of the corporation. Hudson *v.* Carman, 41 Me. 84. In an action between third persons the records of the corporation need not be produced to prove the authority of the president to do a certain act, but it may be shown by other evidence. But so, too, it may be shown by the records. Cabot *v.* Given, 45 Me. 144. And the same rule prevails as to the appointment and authority of a cashier of a bank, and of deposits made in the bank. Concord *v.* Concord Bank, 16 N. H. 26. And this is so, even though the charter provides that the signature of the president, attested by the secretary, shall be taken as full evidence of the doings of the corporation. Hankins *v.* Shoup, 2 Ind. 342. The by-laws of a corporation, when they have been written out and recorded in the books of a corporation, may be proved by the books. But when they rest in parol, they may of course be proved by parol. Thus by the charter of a bank the president and directors were authorized to make all such by-laws and regulations for the government of the corporation, its officers and members, as they or a majority of them should from time to time think fit. In an action by the bank, upon a certain writing being given in evidence, headed "By-Laws," and which purported to have been the by-laws of the bank while its business was transacted under articles of association and before the act incorporating it was passed, it was objected that there was no evidence that the writing produced had been adopted as the by-laws of the corporation, there being no entry or memorandum of such adoption among the minutes of its proceedings. It was held, 1. That, the authority to make by-laws being specially delegated to the president and directors, and no particular mode of exercising it being prescribed by the charter, it was no more necessary that their adoption should be in writing, than the acts or contracts of any other duly authorized agents; 2. That, it being proved by the cashier that the by-laws in question were always reputed to be the by-laws of the corporation, and with the exception of two articles were so observed by him; and by a director, that they were delivered to him as such upon his election, and that decisions by the board of directors were made agreeably to them in any question upon their conduct, this was a sufficient adoption of the by-laws by the president and directors. Md. Ct. of Appeals, 1827, Union Bank of Maryland *v.* Ridgely, 1 H. & G. (Md.) 324. The records of a school district are proper and legitimate evidence of votes for such district, in a suit to which it is a party. South School District *v.* Blakeslee, 13 Conn. 227.

[1] Montgomery R. R. Co. *v.* Hurst, 9 Ala. 513.

written appointment, to prove the appointment, but when the statute does not require the appointment to be made in writing, and it does not appear to have been so made, it may be proved by parol.[1] So if in actions between third persons the question is, as to whether a certain person is a stockholder of a certain corporation, the stock-books of the corporation not only are admissible, but, as a rule, should be produced, or their contents in that respect shown, where the party cannot produce them. And especially is this the case where the charter or general law provides that all transfers shall be made upon the books of the corporation.[2]

In some of the states, by statute, these books are made admissible for certain purposes as *prima facie* evidence; but even in those cases they may be controverted by other proof, and omissions therein may be supplied by parol.[3] When the books of a corporation are admissible as evidence, if there is nothing on their face to raise a suspicion that the corporate proceedings have been irregular, they will be treated and referred to as evidence of the legality of its proceedings. Thus, where, by the statute, a certain proportion of the corporators were required to be present at a meeting to pass a certain vote, it was held that a statement in the record that "upon due invitation the corporators met, etc.," amounted to evidence that the requisite number were present.[4] The books of a corporation are not evidence to prove a usage, by entries of acts of submission by particular persons to the exercise of rights insisted on, without proof

[1] Hamilton *v.* Newcastle, &c., R. R. Co., 9 Ind. 359.

[2] Coffin *v.* Collins, *ante*. But see Hare *v.* Waring, 3 M. & W. 362. Where a book is made by statute *prima facie* evidence of proprietorship of shares in the corporation, it is admissible as such, though it has been irregularly kept, London Grand Junction Railw. Co. *v.* Freeman, 2 M. & G. 606; Birmingham, &c., Railw. Co. *v.* Locke, 1 Q. B. 256; and is even evidence for the company in an action for calls. See London & Brighton Railw. Co. *v.* Fairclough, 3 Scott N. R. 68; London & Grand Junction Railw. Co. *v.* Graham, 1 Q. B. 271.

[3] Thorne *v.* Travellers' Ins. Co., 80 Penn. St. 15; Laymouth *v.* Koehler, 35 Mich. 22; Reynolds *v.* Schwimpus, 27 Ohio St. 311; Board of Education *v.* Moore, 17 Minn. 412.

[4] Com. *v.* Wallper, 3 S. & R. (Penn.) 29; Wood *v.* Jefferson Co. Bank, 9 Cow. (N. Y.) 194; Grays *v.* Turnpike Co., 4 Rand. (Va.) 578.

aliunde of the situation of those persons and their relative position in reference to the corporation.[1] The books of a banking corporation have been held admissible as evidence in a suit on a note brought by the bank against the indorser, a stranger, to prove the election of its officers; and this was held sufficient, *prima facie*, to show that the bank had complied with the previous requisitions of their charter, and that it had a legal existence.[2]

The books of a corporation have been allowed as evidence for them, in suits against strangers, in aid of the testimony of a witness who had made an entry therein, the truth of which was in question.[3] This seems, however, to have been upon the principle which allows memorandums, made of a transaction at the time, to go to the jury, under certain circumstances, along with the testimony of the person who made it. The court slightly advert also, in support of their decision, to the doctrine allowing previous consistent declarations of a witness to be given in evidence in corroboration of his oath. In this respect the entries in the books of a corporation would obviously stand upon the same footing as a similar entry in a tradesman's book. And there are many cases where the entries in the books of banks have been both admitted and rejected, upon grounds which are well applicable to books of individuals. The books of incorporated banks, etc., stand upon a different footing, generally, in this country, from the books of the Bank of England. The former are not public books, in the sense in which that term is understood by the courts, except as among the members of the corporation. In other cases, the rules of admissibility in regard to them, as well as the mode of authenticating entries in them, are not essentially variant from those which relate to books of a mere private nature.[4]

The corporation of a city, and municipal corporations

[1] Davis *v.* Morgan, 1 Price, 77.

[2] Wood *v.* The Jefferson Co. Bank, 9 Cow. (N. Y.) 194, 205; State *v.* Buchanan, 1 Wright (Ohio), 233.

[3] Farmers & Mechanics' Bank *v.* Boraef, 1 Rawle (Penn.), 152.

[4] Ridgway *v.* Farmers' Bank of Bucks County, 12 S. & R. (Penn.) 256; The Philadelphia Bank *v.* Officer, 12 S. & R. (Penn.) 49; Courtney *v.* The Com., 5 Rand. (Va.) 66.

generally, differ from a private corporation in respect to the matters we are considering. An agent of the corporation of the city of New York, for instance, sued for acts done by order of the corporation, in removing obstructions in a street, may, in his *individual capacity*, avail himself of the minutes and books of the corporation in his defense. "It" (the corporation of the city) "more nearly resembles," say the court, adverting to the distinction noticed, "the legislature of an independent state, acting under a constitution prescribing its powers. The acts of this corporation concern the rights of the inhabitants of the city; it exercises a delegated power, not for its own emolument, but for the interests of its constituents; and while it keeps within the limits of its authority, the constituents are bound by the acts of the corporation. When the citizen wishes to show those acts, he must resort to the authentic record of them, which is the original minutes of the corporation." This, it seems, is the best evidence.[1]

The official tax-books of the corporation of the city of Washington, made up by the register, from the original returns of the assessors laid before the board of appeals, are evidence to show the tax assessed upon an individual; the assessors' original returns need not be produced.[2] "The book was made out by an officer, in pursuance of a duty expressly enjoined by law. This not only makes the tax-book evidence, but the best evidence which can be given of the facts it contains." In Kentucky, the minutes of the trustees of Louisville and other towns in the commonwealth are competent evidence on trials as to town property. But there is no provision authorizing their verification by the clerk's certificate. It would seem to follow then, say the court, that they ought to be verified by oath, and proved to be true copies from the real book of the trustees, kept by the proper officer and recognized by the board as such.[3] But on writ of error, unless the objection to the admissibility in

[1] Deming *v.* Roome, 6 Wend. (N. Y.) 651.

[2] Rockhadorf *v.* Taylor's Lessee, 4 Pet. (U. S.) 349.

[3] Dudley *v.* Grayson, 6 Mon. (Ky.) 259

the court below was distinctly on the ground that the paper was not sufficiently authenticated, the court will not notice it, but will only regard the objection as one of relevancy or competence.

In Virginia the statute vested certain trustees with one hundred acres of land to be appropriated partly as a present to settlers and partly for the benefit of the proprietors; held that the books and other records of the trustees, called in the case a corporation, being first shown to be in the handwriting of the proper officers of the board, were admissible in evidence. The court said the trustees were established for public purposes; and their books were the best evidence of their acts and proceedings.[1] And in Massachusetts, a proprietary book of ancient date has been held admissible, without proving the entries by the clerk of the proprietors who made them.[2] The sales book of the proprietors of Cincinnati has been admitted as to early sales.[3] An ancient book of records of the town of Boston, entitled the Book of Possessions, which, although not regularly authenticated, had been preserved among the records of the town, was held competent and sufficient evidence to establish ancient titles under allotments from the town.[4] A book of the proprietors of common lands was allowed in evidence in tracing title, on a witness stating that it had been formerly in the possession of his grandfather, whose executor had it thirty years, and then delivered it to the witness; the presumption from lapse of time being, say the court, that the witness had the lawful custody of it, and there being no evidence of the present existence of the proprietary with a clerk to keep the books and records; and there being no place appointed by law for the deposit of such books when a proprietary becomes extinct.[5] The town record books, in New Hampshire, may be used by selectmen in justifying their

[1] Owings *v.* Speed, 5 Wheat. (U. S.) 420.

[2] The Proprietors of Monumoi *v.* Rogers, 1 Mass. 159; Pitts v. Temple, 2 id. 538.

[3] Williams *v.* Burnet, 1 Wright (Ohio), 53.

[4] Rust *v.* The Boston Mill Corporation, 6 Pick. (Mass.) 158.

[5] Tolman *v.* Emerson, 4 Pick. (Mass.) 160.

doings as such, to show their appointment by a meeting of the inhabitants; and also to show a tax voted at such meeting.[1] The record of the appointment, and proof that the selectmen had acted under it, was held in this case proper evidence to be submitted to the jury, as in favor of the selectmen, from which to infer that the meeting, at which the selectmen were appointed, was a legal one in all respects.[2] It seems that a record like the above, when erroneous, may be amended by the clerk so as to conform to the truth, by motion to the court on behalf of the selectmen.[3] The chest of an incorporated company, kept by their clerk for the time being, is the proper custody for old documents relative to the admission of freemen and other acts of the company; but the private house of a former deceased clerk is not the proper custody for a convention dated in the reign of Edward IV, between the then Prince of Wales and the corporation.[4] The book of a corporation must in general be identified; and it must be shown that the book was kept and the entries were made by the proper officer, or some other person in his necessary absence.[5] It is not enough that the book is in the handwriting of a person stated therein to be secretary, and that the witness producing it received it from such person.[6] Nor is it sufficient merely that the book is proved by a former secretary or clerk to have been handed down to him as the corporation book.[7] In England, mere sworn copies of the books of the Bank of England are evidence. It is otherwise, as a general rule, in respect to the books of banks in this country. In assumpsit against a bank on a bill drawn by its president, his authority to draw was denied. To prove one item in his case, the plaintiff offered examined copies from the discount-book of the Bank of Pennsylvania, a third

[1] Bishop *v.* Cone, 3 N. H. 513; McFadden *v.* Kingsbury, 11 Wend. (N. Y.) 669.

[2] Bishop *v.* Cone, *ante*.

[3] Well *v.* Battelle, 11 Mass. 477; Taylor *v.* Henry, 2 Pick. (Mass.) 397.

[4] Shrewsbury *v.* Hart, 1 C. & P. 114.

[5] Highland Turnpike Company *v.* McKean, 10 John. 154; Gaines *v.* The Tombeckbee Bank, 1 Ala. 50.

[6] Highland Turnpike Company *v.* McKean, *ante*.

[7] Martin *v.* Gunby, 2 H. & J. (Md.) 248.

person. It was held inadmissible, as the original should be produced. The court denied that this came within the rule that where an original is of a public nature and admissible in evidence, an examined copy is evidence *per se*. To make it admissible, if so at all, there must be proof that the original was made by an officer of the bank; the officer himself to prove this, if to be found; and if not, his handwriting to be proved. The court admitted the contrary rule as to the Bank of England, but said that their books are truly of a public nature. But to give that name to the books of the Bank of Pennsylvania, and on the same principle to those of incorporated insurance companies, etc., with which the country has been inundated, might produce serious consequences. "We know," say the court, "that these books are often badly kept; and it would be dangerous to admit copies in evidence when the originals may be easily had; nor should the originals be admitted without proof by whom the entries were made."[1] In another case, it was held that the entries in a book of an incorporated bank were not admissible, as between third persons, to show a deposit of money, unless it be first proved that the clerk who made the entries was dead, or beyond the reach of the process; and this, though it was admitted that the entries in question were made by J. M., who was clerk at the time. The rule has subsequently been laid down thus: "I take it to be a general and established principle, that neither copies of the books of an incorporated bank, nor the books themselves, are admissible against any other than the bank, or without proof being first made by whom the entries in the book were made; and that the proper witnesses to make such proof are the clerks by whom the entries were made, if to be found within the jurisdiction of the court; but if dead or out of the jurisdiction of the court, proof may be made of their handwriting."[2] It seems, however, according to those cases, that where a bank is located at a great distance from the place of trial, or where the books are required to be in different places at the same

[1] Ridgway *v.* Farmers' Bank, 12 S. & R. (Penn.) 256.

[2] Philadelphia Bank *v.* Officer, 12 S. & R. (Penn.) 49; Goehenauer *v.* Goad, 3 Penn. 244.

time, an examined copy from the books, with proof that the original entries were made by an officer of the bank (proved by himself, if to be found, and if not, with proof of his handwriting), would be competent evidence. Mere certified copies would not be admissible, unless rendered so by statute.[1] In Massachusetts, it has been said that clerks of religious and other corporations, and other recording officers, may certify copies of their records; and in doing so, act under the obligation of an oath of office, and their certificates are evidence.[2] The general rule, however, is otherwise, and, unless through the intervention of a statute, mere certified copies of corporation records and minutes are inadmissible.[3] The proceedings of churches and ecclesiastical bodies generally may be proved by parol, though minutes are kept of them by their clerks:[4] and in the case last cited the minutes of a presbytery were held evidence to prove certain facts, *e. g.*, the suspension of a minister, on due complaint made, but not to show the facts upon which it was founded. The record of a certificate of incorporation of a religious society is not evidence of the fact of incorporation. The certificate itself must be produced.[5] Where it was referred to the court to determine whether a book produced was the record of a church, it appearing that during the whole time it was kept, the ministers of the parish and pastor of the church kept it wholly or principally, he being the proper officer to keep such a record; and being kept in the form of a record, and containing a regular statement of the admission of members, the choice of officers, and the transaction of the regular business of the church; held that such book was to be considered the record book of the church.[6] The receipt book of a corporation, containing entries of payments by a member, is evidence against the company, without producing the officer by whom they were

[1] Hallowell, &c., Bank *v.* Hamlin, 14 Mass. 178.

[2] Oakes *v.* Hill, 14 Pick. (Mass.) 442; Sawyer *v.* Baldwin, 11 id. 494; Stebbins *v.* Jennings, 10 id. 188.

[3] Dudley *v.* Grayson, 6 Mon. (Ky.) 250; Hallowell, &c., Bank *v.* Hamlin, 14 Mass. 178.

[4] Charleston *v.* Allen, 6 Vt. 633, 639; Dow *v.* Hinesman, 2 Aik. (Vt.) 18; Riddle *v.* Stevens, 2 S. & R. (Penn.) 537.

[5] Jackson *v.* Leggett, 7 Wend. (N. Y.) 377.

[6] Sawyer *v.* Baldwin, 11 Pick. (Mass.) 492.

countersigned. Such entries are not to be rejected because they furnish evidence of other payments than those for which they are properly admissible in evidence.[1] But entries in the books of an incorporated company are not evidence against a member of the company, in respect of a contract entered into by him with the company, although the act by which the company is incorporated authorizes each member to inspect and take copies of the books or any part of them. So, although the entries relate to transactions at a meeting at which such member was present, it appearing that the entries were made after the meeting had terminated, from memoranda made by the clerk at the meeting.[2] Nor are the minutes of a corporation evidence of an agreement alleged to have been made by stockholders as individuals, and not intended to bind the corporation.[3]

[1] North American Building Association *v.* Sutton, 35 Penn. St. 463.

[2] Hill *v.* Manchester Water Works Co., 2 N. & M. 573.

[3] Black *v.* Shreve, 13 N. J. Eq. 455.

CHAPTER XIII.

SHOP BOOKS, ACCOUNT BOOKS, ETC.

SECTION
139. Admissibity of, generally.
140. Rule when better Evidence exists.
141. Rule in different States.
142. Effect of Alterations, etc.; of what Things they may be used as Evidence.
143. Of what Things they are not Evidence.
144. What are Proper Subjects of Book Charge.
145. Time of Making Entries, etc.

Sec. 139. Admissibility of, generally.

Formerly, when parties in interest were not permitted to testify in their own favor, the question of the admissibility of shop books, and books of account generally, was of far more importance than at the present time, when even the parties to the action are generally permitted to testify in their own favor, because, in any event, whether the books are admissible or not, he may use them as memoranda to refresh his memory; and any tribunal is quite apt to give additional weight to the evidence, even of a party, which is sustained by entries of the event, recorded at the time of the occurrence, especially where there is no reasonable ground for suspicion that the party was manufacturing evidence for himself. It has always seemed to us that any rule which excludes original books of entry is one clearly opposed to sound policy and the ascertainment of the truth, and that the only really sensible rule is to admit such books in proper cases, *and leave it for the jury to say what degree of credit shall be given to them, in view of their appearance, the manner in which they are kept, and all the circumstances of the case, including the evidence in support of or in contradiction of the entries.* And this is practically the rule in several of the States. Thus, in Delaware a notched stick, accompanied by the oath of the party, is held to be a good book of original entries

where it is the only method by which the party keeps his accounts,[1] and so are scraps of paper upon which items of debt or credit are originally entered,[2] and the book of original entries kept by a party is evidence as to any matter which is a proper subject of book charge,[3] although some of the entries are falsified,[4] and where charges are originally made on a slate and transferred to a day book, the day book is treated as an original book of entries.[5] But in all cases the books must be supplemented by the oath of the party,[6] and the book alone is not sufficient to bind the party charged.[7] And substantially the same rules prevail in Connecticut, California, Vermont, Massachusetts, New Hampshire, Tennessee, Maryland, Louisiana, Pennsylvania, South Carolina, North Carolina, Virginia and several other States, either as a common-law rule or by virtue of express statutory provisions.[8] In all the other States such books are admissible under certain restrictions, which are generally peculiar to each State. It would hardly be practicable here to point out in detail these peculiar restrictions, as they are of no consequence except to practitioners in the various States, who are presumed to be

[1] Rowland *v.* Burton, 2 Harr. (Del.) 288. And in Vermont the author once had occasion to put in evidence, as the book of original entries of a party, pieces of boards sawed out of the defendant's corn crib, upon which he had marked as delivered the number of bushels of grain which he had delivered to the plaintiff under a contract, to prove delivery, and, although objected to, the boards were admitted by PECK, J.

[2] Smith *v.* Smith, 4 Harr. (Del.) 532; Hall *v.* Field, 4 id. 533.

[3] Townsend *v.* Townsend, 5 Harr. (Del.) 126.

[4] Gosewich *v.* Zebley, 5 Harr. (Del.) 124. Nor do alterations or erasures. Sargeant *v.* Pettibone, 1 Aik. (Vt.) 355.

[5] Ewart *v.* Morrell, 5 Harr. (Del.) 126; Whitney *v.* Sawyer, 11 Gray (Mass.), 242; Barker *v.* Haskell, 9 id. 218; Morris *v.* Briggs, 3 id. 342; Faxon *v.* Hollis, 13 Mass. 427; Gibson *v.* Bailey, 13 Met. (Mass.) 537; Smith *v.* Sanford, 12 Pick. (Mass.) 139. But see Ogden *v.* Miller, 1 Browne (Penn.), 147; Forsyth *v.* Norcross, 5 Watts (Penn.), 432; Kessler *v.* McConahy, 1 Rawle (Penn.), 435, *contra*.

[6] Fitzgibbon *v.* Kenney, 3 Harr. (Del.) 317.

[7] Walker *v.* Yeatman, 5 Harr. (Del.) 267.

[8] Cook *v.* Swan, 5 Conn. 140; Stiles *v.* Hamin, 21 id. 507; Le Franc *v.* Hewitt, 7 Cal. 186; Landis *v.* Turner, 14 Cal. 573; Prime *v.* Smith, 4 Mass. 455; Ball *v.* Gates, 13 Met. (Mass.) 491; Faxon *v.* Hollis, 13 Mass. 427; Bassett *v.* Spofford, 11 N. H. 167.

familiar with the rules in this respect in their own courts. In some of the States, particularly New York and Georgia, the admission of a party's books depends upon the circumstance whether better evidence of the facts can be had,[1] the rule being that such books are admissible upon proof by the party offering them, 1. That he kept no clerk, or else the clerk is dead, *or otherwise inaccessible;* 2. Upon proof that the book tendered is his original book of entries, his own oath being sufficient for this purpose; 3. Upon proof by his customers that he usually kept correct books; 4. Upon inspection by the court to see if the books are free from the suspicion of fraud.[2]

Sec. 140. Rule when better Evidence exists.

In these States, as well as in some others,[3] the rule excludes the books when better evidence of the facts is attainable, and

[1] Bracken *v.* Dillon, 64 Ga. 243.

[2] Hull *v.* Carey, 5 Ga. 239; Slade *v.* Nelson, 20 Ga. 365; Merchants' Bank *v.* Taylor, 21 id. 334; Bailey *v.* Barnelly, 23 id. 582; Chastain *v.* Brown, 31 id. 346; Crawford *v.* Stetson, 51 id. 121; Petit *v.* Teal, 57 id. 145; Reaisor *v.* Powell, 61 id. 30. Now embodied in the Code, § 3777. In New York the rule is substantially the same as above, it being that, where there are regular dealings between the plaintiff and defendant, and it is proved that the plaintiff keeps honest and fair books of account; that some of the articles charged to the defendant have been delivered to him; and that the plaintiff keeps no clerk, his books, from necessity, are admissible in evidence, for the consideration of the jury. Vosburgh *v.* Thayer, 12 John. (N. Y.) 461; Linnell *v.* Sutherland, 11 Wend. (N. Y.) 568; Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42; Conklin *v.* Stanley, 2 Hilt. (N. Y.) 422; Foster *v.* Coleman, 1 E. D. Smith (N. Y.), 85; Houptman *v.* Catlin, id. 729; Morrill *v.* Whitehead, 4 id. 239. But where the party kept a clerk, proof of his decease is essential to let in the books, and the circumstance that he is out of the jurisdiction is not enough. Brewster *v.* Doane, 2 Hill (N. Y.), 537.

[3] Wheeler *v.* Smith, 18 Wis. 651; Eastman *v.* Moulton, 3 N. H. 556; Kennedy *v.* Fairman, 1 Hayw. (Tenn.) 458. In Texas the rule seems to be, that where a witness is called to prove a book of account, he should be inquired of as to the whole method of keeping the books, who made the different entries, etc., and if the testimony of such witness is insufficient to prove the account, other witnesses should be called; and when the plaintiff rests his case, the defendant may move to exclude all items not proved by competent evidence. Ward *v.* Wheeler, 18 Tex. 249; Burnham *v.* Chandler, 15 Tex. 441; Townsend *v.* Coleman, 18 Tex. 418; Taylor *v.* Coleman, 20 Tex. 772. In an action

the books are admissible when, from necessity, they afford the best evidence of the facts contained therein.

Sec. 141. Rule in different States.

As has been seen, the rules relating to the admission of books of account, in the different States, are not uniform.

upon promissory notes given upon settlement of account, the defendants having pleaded in reconvention that the plaintiff was liable for certain book accounts due them which the plaintiff had undertaken to collect and apply to the notes sued on, it was held that, in the absence of evidence establishing such liability of the plaintiff, it was error to admit the account books in evidence without definite explanation of the use to be made of them by the jury. Compton *v.* Young, 26 Tex. 644. In South Carolina, where the entries in the plaintiff's book, which was offered in evidence, were, in part, made from memoranda taken by his slave at the time of the delivery of the articles, and partly from memoranda made by defendants themselves, it was held that the entries were not admissible in evidence, and that the plaintiff was not a competent witness to prove them. Venning *v.* Hacker, 2 Hill (S. C.), 584. So the memorandum books of a peddler, in which he made his original entries for the most part in pencil, and carried about in his pocket, are not admissible in evidence as merchants' books of accounts. Thayer *v.* Deen, 2 Hill (S. C.), 677. And where a shopkeeper himself sold and delivered goods to a party, and during the same day the entries were made by another person, who occasionally acted as clerk for him, it was held that the book was no evidence of the debt, and that the evidence was inadmissible. Harris *v.* Caldwell, 2 McMull. (S. C.) 133. The books of a tradesman or mechanic are admissible in evidence only to prove the performance and delivery of work done within the mechanic's shop. Where the work is done outside of his shop, or on the premises of the party charged, such as building or repairing a house or any other fixture, there can be no necessity for books, for the work is apparent. St. Phillip's Church, 2 McMull. (S. C.) 306. Where A. verbally authorized B. to let C. have goods on his guaranty, and B. charged the goods to A. for C., in an action brought by B. against A. for the value of the goods, B. may verify his books by his oath, but cannot testify to anything further to establish A.'s liability. Brown *v.* Kinloch, 2 Spears (S. C.), 284. If a merchant's book of original entries shows that the goods charged to defendant were delivered to a third person, the entries, supported by the plaintiff's oath, are not, of themselves, enough to charge the defendant. The order, direction, or request of the defendant must be proved by other evidence. Kinlock *v.* Brown, 1 Rich. (S. C.) 223. So, where, to prove goods sold and delivered, the plaintiff, a merchant, produced his books, and testified "that his clerk reported to him the terms agreed upon by him and the defendant respecting the sale of the goods, and upon that report the witness made the entry; that he delivered the goods to a drayman, who told witness that defendant sent for them," it was held that the evidence was insufficient to support the action. Clough *v.* Little, 3 Rich. (S. C.) 353.

In some of them[1] the books are left to the jury, even though falsified or altered, to judge of the degree of credence to be given to them, while in others, indeed in most of the others, before the books can be admitted, they are to be submitted to the inspection of the court, and if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are excluded, and such also is the rule when they are manifestly altered or evaded, unless such alterations are explained.[2] If upon inspection by the court they appear to be fair and honest, and free from fraudulent practices and proper to be laid before the jury, the party is then required to make oath that they are the books in which the accounts of his ordinary transactions are usually kept,[3] and that the goods therein charged were actually delivered, or the money actually paid, or the services actually rendered, *and that the entries were made at or about the time of the transaction and are the original entries thereof, and that the sums therein charged have not been paid, except as indicated by the credits in the book.*[4] If the party

[1] Delaware, Gossenich *v.* Zibley, 5 Harr. (Del.) 124; Sargeant *v.* Pettibone, 1 Aik. (Vt.) 355.

[2] Churchman *v.* Smith, 6 Whart. (Penn.) 106; Cogswell *v.* Dalliner, 2 Mass. 217; Faxon *v.* Hollis, *ante;* Cole *v.* Anderson, 8 N. J. L. 68; Jones *v.* De Kay, 2 id. 695; Thomas *v.* Dyott, 1 N. & McCord (S. C.), 186. Time books kept with the men engaged in work upon a railroad are not admissible as evidence to show the cost or amount of such work *until it is shown that they were properly and correctly kept.* For *v.* St. Louis, &c., R. R. Co., 54 Iowa, 723.

[3] Fry *v.* Barker, 2 Pick. (Mass.) 65.

[4] Ives *v.* Niles, 5 Watts (Penn.), 324; Cogswell *v.* Dalliner, *ante.* In Curren *v.* Crawford, 4 S. & R. (Penn.) 9, it was held to be essential to this kind of evidence that the charges should be in such a state that they may be presumed to be the minutes of the daily business of the plaintiff. Where this appearance is wanting, the evidence is rejected as incompetent; and where it exists, and the book is admitted, the evidence remains liable to all objections suggested by unfair appearances of the particular account in issue, or from the whole book, or minutes, taken together, and which naturally affect the credibility of the evidence and must appear to have been made at or near the time of the transaction to be proved; and when the contrary is apparent, or is shown by proof, the books are inadmissible. But no precise time is fixed by law when the entry should be made. Jones *v.* Long, 3 Watts (Penn.), 326; Henry *v.* Oves, 4 id. 46; Fairchild *v.* Dennison, id. 258; Walter *v.* Bollman, 8 id. 544; Lonergan *v.* Whitehead, 10 id. 249; Cook *v.* Ashmead, 2 Miles (Penn.), 268; Thompson *v.* Bullock, id. 269.

is dead, his books may be admitted if they are shown by the suppletory oath of his executor or administrator to have come into his possession as the genuine books of account of the deceased, and he also swears that, to the best of his knowledge and belief, the entries therein are original and contemporaneous and unpaid.[1] It must also appear that the book is the registry of business actually done, and not of orders, executory contracts and things to be done subsequent to the entry;[2] and the entry must have been made for the purpose of charging the debtors with the debt, and not as a mere memorandum for some other purpose. Thus, a memorandum in a check book, upon the "stub" thereof, has been rejected, when cut from the book, and offered as evidence of the date, amount and tenor of the check.[3]

In most of the States, as has been before stated, even though the case is *prima facie* a proper one for proof by entries, if it appears either on the face of the charge or in any other way that there is, in fact, living or attainable proof of the item, independent of the entries, the latter are then inadmissible; for it being apparent that the ordinary common-law proof exists, which is superior in degree, that must be produced. It can only be dispensed with, and the entries received, where it is shown to be in truth beyond the reach of the party. The common case in New York is where the party has a clerk,[4] although one case seems to hold that the entire entries may be received, though part were made by the clerk, and the rest by the party.[5] Nothing but the death of the clerk will let in the book.[6] Thus, in a North Carolina

[1] McLellan *v.* Crofton, 6 Me. 307; Prince *v.* Smith, 4 Mass. 455; Bentley *v.* Hollenbeck, Wright (Ohio), 169.

[2] Wilson *v.* Wilson, 6 N. J. L. 9; Terrill *v.* Beecher, 9 Conn. 344; Bradley *v.* Goodyear, 1 Day (Conn.), 104; Fairchild *v.* Dennison, 4 Watts (Penn.), 258.

[3] Watson *v.* Gadin, Wright (Ohio), 219; Cooper *v.* Morrell, 4 Yeates (Penn.), 341.

[4] Vosburgh *v.* Thayer, 12 John. (N. Y.) 462.

[5] M'Allister *v.* Reab, 4 Wend. (N. Y.) 483. But *quere* as to such entries as appear to be made by the clerk; for other cases have, with a laudable jealousy of such self-fabricated evidence, adhered closely to the rule that where the entry is made by the clerk, nothing shall excuse his absence except his death. Kenedy *v.* Fairman, 1 Hayw. (N. C.) 458; Whitefield *v.* Walk, 2 Hayw. (N. C.) 24.

[6] Kenedy *v.* Fairman, 1 Hayw. (N. C.) 458.

case, the clerk was absent in the West Indies, and in another,[1] the clerk was in South Carolina; yet such absence was held no excuse in either case. Some cases, however, allow the excuse that the clerk is permanently beyond the power of the court.[2] Upon the same principle, a schoolmaster's original entries are not proof; for he has usually many witnesses by whom to prove his services, and he must avail himself of them.[3] The analogy of these cases has been carried by authority into a variety of transactions; and the courts very judiciously appear determined to act on the same principle in regard to all matters forming the subject of evidential account books. True, in one case a lime burner and vendor's book was received to prove large sales of lime delivered out by servants and agents, where the party was generally present, either at the kiln, when the loads were placed in wagons, or else saw the delivery; and this, though he was absent on a very few occasions;[4] and in an other case, entries made by the party from a memorandum of a servant were received.[5] If the goods were delivered to a third person on account of the vendee, the books are not evidence;[6] not even though they were the vendee's servants.[7] So, though the books of a printer are receivable, they are no farther so than to prove the retainer to do the work; for the files may be produced to show the *quantum*, and the price may be proved by others;[8]

[1] Whitefield *v.* Walk, *ante.*

[2] Sterritt *v.* Bull, 1 Binn. (Penn.) 234.

[3] Pelzer *v.* Cranston, 2 M'Cord (S. C.), 328.

[4] Curren *v.* Crawford, 4 S. & R. (Penn.) 3.

[5] Ingraham *v.* Bockius, 9 S. & R. (Penn.) 285. Yet the subsequent cases of Smith *v.* Lane, 12 S. & R. (Penn.) 80, and Kessler *v.* M'Conachy, 1 Rawle (Penn.), 441, both manifest a strong tendency to great strictness, and a conformity with the other cases in the State of Pennsylvania and elsewhere. But see Kaughley *v.* Brewer, 16 S. & R. (Penn.) 133. In a former case in that State, charges for work done by a servant were disallowed as evidence, the court saying such evidence was allowed from necessity, and where the work has been done by a third person, the necessity does not exist. He can prove it. "*Cessante ratione, cessat ipsa lex.*" Wright *v.* Sharp, 1 Browne (Penn.), 344. So, charges for work done by servants, for they are competent witnesses. Wright *v.* Sharp, 1 Browne (Penn.), 344.

[6] Kerr *v.* Love, 1 Wash. (U. S. C. C.) 172.

[7] Eastman *v.* Moulton, 3 N. H. 156.

[8] Richards *v.* Howard, 2 N. & M'Cord (S. C.), 474.

nor are a tailor's books receivable to prove goods delivered to the defendant's ward by the order of the defendant. Here they are mere proof of the delivery. Books are, in general, not allowed to prove a direction or instruction to deliver to a person other than the defendant.[1] The charge on its face purporting to be of goods delivered to another on the defendant's order, it was rejected as incompetent.[2] And where goods were delivered on written orders, an account was excluded as evidence, for that reason among others. The orders should be produced, or otherwise proved on accounting for their absence.[3] Where the goods are delivered out by another or by others, the account kept by them, or by one on their information, cannot be received; for the party has other proof by those who delivered the goods, and they must be produced, or their absence accounted for.[4] Where the charge was for medicine and attendance on an aged menial servant of the defendant, the plaintiff's book was received as usual; but it was held that the defendant's agreement to pay must be proved by evidence *aliunde*.[5] Yet charges for goods sold and delivered to, and services performed for one on account of another, have been sustained by the claimant's original entries in Connecticut, without showing the death or absence of the witnesses. But the question was not presented in the above points of views; and some reliance seems to have been placed on the statute of that State as controlling the case.[6] To be admissible at all, the entries should be made at or near the time of the transaction. The law fixes no precise instant. They are not to be registers of a past transaction, but memoranda of transactions as they occur;[7] and where some were made at the time and others some months after, without distinguishing which, or assigning a good reason, the whole were rejected as incompetent.[8] In an action for labor

[1] Deas *v.* Darby, 1 N. & M'Cord (S. C.), 436.

[2] Tenbroke *v.* Johnson, 1 N. J. L. 288; Townley *v.* Wooley, 1 id. 377.

[3] Smith *v.* Lane, 12 S. & R. (Penn.) 80.

[4] Smith *v.* Lane, *ante*.

[5] Coffin *v.* Cross, 3 Dane's Abr. 322.

[6] Bryan *v.* Jackson, 4 Conn. 288.

[7] Curren *v.* Crawford, 4 S. & R. (Penn.) 5; Ewing *v.* Sparks, 7 N. J. L. 59; Eastman *v.* Moulton, 3 N. H. 156; Cogswell *v.* Dalliner, 2 Mass. 217.

[8] Vann *v.* Feariss, 1 Yeates (Penn.), 321.

and materials furnished under contract, entries in the plaintiff's journal and ledger *made after the work was done, and not from his memorandum book*, which had been introduced by the defendant, were held to be inadmissible in rebuttal of the latter.[1]

Sec. 142. Effect of Alterations, Etc.; of what Things they may be used as Evidence.

If the day book, journal, etc., contains marks, showing that the items have been posted into the ledger, the latter must also be produced.[2] Entries made in the manner stated are not, in all cases, received as satisfactory evidence of the matters stated, but only as proof of things which are not susceptible of better proof.[3] They are, however, satisfactory evidence of goods sold and delivered from a shop or store, or of services personally performed,[4] and, in some of the States, of the payment of small sums of money;[5] but a containing only charges for money is not admissible as a book of accounts, even where the statute expressly makes the party's book of accounts admissible.[6]

Sec. 143. Of what Things they are not Evidence.

A party's books are never admissible to establish items which do not form the proper subject of book charges, which, in most of the States, embrace such items as are recoverable in general assumpsit, although in some of the States the rule has a much narrower application. Thus among matters which do not form the proper subject of book charges are embraced charges for advertising in a newspaper,[7] for money paid and not applied as directed,[8] of goods delivered to a

[1] Bentley *v.* Ward, 116 Mass. 333.

[2] Prince *v.* Sweet, 2 Mass. 569.

[3] Watts *v.* Howard, 7 Met. (Mass.) 478.

[4] Easby *v.* Allen, 1 Cooke (Tenn.), 388; Case *v.* Patten, 8 John (N. Y.) 211; Charleton *v.* Lowry, 1 Martin (N. C.), 26; Spencer *v.* Saunders, 1 Bay (S. C.), 119; Vosburgh *v.* Thayer, 12 John. (N. Y.) 461; Wilmer *v.* Israel, 1 Browne (Penn.), 257.

[5] Prince *v.* Smith, *ante;* Burns *v.* Fay, 14 Pick. (Mass.) 8; Dunn *v.* Whitney, 10 Me. 9.

[6] Parries *v.* Bellaeus, 52 Vt. 351.

[7] Richards *v.* Howard, 2 N. & McCord (S. C.), 474.

[8] Bradley *v.* Goodyear, 1 Day (Conn), 104.

third person,[1] for commissions upon the sale of a vessel,[2] for the labor of servants,[3] for dockages of a vessel,[4] for money paid under a special agreement,[5] or a delivery of goods under such agreement,[6] an article omitted by mistake in a prior settlement,[7] the use and occupation of real estate, and the like.[8] But after the order to deliver goods to a third person is proved by competent evidence *aliunde*, the delivery itself may be proved by the books and suppletory oath of the plaintiff, in any case where such delivery to the defendant in person might be so proved.[9] The charges, moreover, must be specific and particular. A general charge for professional services, or for work and labor by a mechanic, without any specification but that of time, cannot be supported by this kind of evidence.[10] And regularly the prices ought to be specified ; in which case the entry is *prima facie* evidence of the value.[11] But whatever be the nature of the subject, the transaction, to be susceptible of this kind of proof, must have been directly between the original debtor and the creditor, the book not being admissible to establish a collateral fact.[12]

Although books, such as have been described, are admitted to be given in evidence, with the suppletory oath of the party, yet his testimony is still to be weighed by the jury, like that of any other witness in the cause ; and his reputation for truth is equally open to be questioned.[13] In

[1] Tenbrook *v.* Johnson, 1 N. J. L. 288 ; Townly *v.* Woolsey, 1 id. 377 ; Kerr *v.* Love, 1 Wash. (Va.) 172.

[2] Winsor *v.* Dilloway 4 Met. (Mass.) 221.

[3] Wright *v.* Shoop, 1 Browne (Penn.), 344.

[4] Wilmer *v.* Israel, 1 Browne (Penn.), 257. Because they can testify to the services.

[5] Pritchard *v.* McOwen, 1 N. & McC. (S. C.) 131, *n.* ; Dunn *v.* Whitney, 10 Me. 9 ; Green *v.* Pratt, 11 Conn. 205.

[6] Nickle *v.* Baldwin, 4 W. & S. (Penn.) 290.

[7] Punderson *v.* Shaw, Kirby, 150.

[8] Beech *v.* Mills, 5 Conn. 493 ; Newton *v.* Higgins, 2 Vt. 366 ; Dunn *v.* Whitney, 10 Me. 9.

[9] Mitchell *v.* Belknap, 22 Me. 475.

[10] Lynch *v.* Petrie, 1 N. & McC. (S. C.) 130 ; Hughes *v.* Hampton, 2 Const. Rep. (S. C.) 476.

[11] Hagaman *v.* Case, 4 N. J. L. 370 ; Ducoign *v.* Schreppel, 1 Yeates (Penn.), 347.

[12] Mifflin *v.* Bingham, 1 Dall. (U.S.) 276 ; Kerr *v.* Love, 1 Wash. (U. S.) 172 ; Deas *v.* Darby, 1 N. & McC. (S. C.) 436 ; Poultney *v.* Ross, 1 Dall. (U. S.) 238.

[13] Kitchen *v.* Tyson, 2 Murph. (N. C.) 314 ; Elder *v.* Warfield, 7 H. & J. (Md.) 391.

some States, the books thus admitted are only those of shopkeepers, mechanics and tradesmen; those of other persons, such as planters, scriveners, schoolmasters, etc., being rejected.[1]

Sec. 144. What are proper Subjects of Book Charges.

Among matters which do form the proper subject of book charge, are *items for personal property sold and delivered*,[2] and this is the rule irrespective of the value of the property, or whether the charge embraces several, or only a single item.[3]

In order to be the proper subject of book charge, it is not in all cases necessary that the goods should be delivered to the person to whom they are charged, or upon his express order. *It is sufficient if they are furnished to a person under such circumstances that the law will imply a promise, on the part of the person to whom they are charged, to pay for them.* Thus, as a husband is bound to furnish support for his wife and provide her with necessaries, and a father to supply his minor children with necessaries, or a guardian to provide his ward with necessaries out of the ward's estate, it follows that a person supplying such articles may properly charge them in account to the person who is legally bound to supply them, and being proper items of book charge, the book is evidence for the party supplying them.[4]

But it must be remembered that in order to warrant a charge upon book for property sold, *it must in all cases have been delivered*,[5] and the circumstance that the goods were ordered absolutely, but not delivered, will not let in the book containing a charge therefor as evidence, because, until an actual delivery is made, the contract is executory.[6]

[1] Geter *v.* Martin, 2 Bay (S. C.), 173; Pelzer *v.* Cranston, 2 McC. (S. C.) 328; Boyd *v.* Ladson, 4 McC. (S. C.) 76.

[2] Shillaher *v.* Bingham, 3 Davies' Abr. 321.

[3] In Leach *v.* Sheppard, 5 Vt. 363, the only charge was 2,088 pounds of meal. In Shillaher *v.* Bingham, *ante*, the charges were for 78 bushels of salt and 132 gallons of rum.

[4] Mills *v.* St. John, 2 Root (Conn.), 188; Swift's Ev. 84.

[5] Howell *v.* Bardin, 3 Dev. (N. C.) 449; Read *v.* Barlow, 1 Aik. (Vt.) 145; 1 Vt. 97.

[6] Rhoades *v.* Gaul, 4 Rawle (Penn.), 404.

So, too, in order to be a proper subject of book charge, *the right to charge for property delivered must exist at the very moment of delivery, and cannot arise afterwards from some special contract or circumstance.* Thus, money advanced to a person under a special contract to deliver goods therefor at a future day,[1] or property delivered to A. to be by him delivered to B., but which he appropriates himself,[2] cannot be made the subject of book charge. But in all the cases in which these questions arose, it will be observed that they arose in actions of "book account" in which, by statute, the parties were permitted to testify, and the principal objection urged against the admission of the class of charges last referred to was, that, to permit such charges to be made and sustained by the party's book and oath, would be permitting the party to testify as to special contracts, whereas the statute only contemplated his being permitted to testify to the quantity, quality and delivery of the articles in question;[3] and this seems to have been the ground upon which the decisions above cited were predicated. Whether the circumstance that, in most of the States, the parties to all classes of actions are now, by statute, permitted to testify in their own behalf, would change the rule relative to book charges, is a question which does not seem to have been decided.

Money loaned may properly be charged upon book, although memorandum notes are given for the amount, unless it is shown that the notes were given and accepted in extinguishment of the book debt.[4]

[1] Peck *v.* Jones, 1 Kirby (Conn.), 289.

[2] Slason *v.* Davies, 1 Aik. (Vt.) 73; Bradly *v.* Goodyear, 1 Day (Conn.), 104.

[3] Phenix *v.* Prindle, 1 Kirby (Conn.), 209; Terrill *v.* Beecher, 9 Conn. 349.

[4] Clark *v.* Savage, 20 Conn. 258. And it seems that this is the case, although the memorandum was taken as evidence of the loan. Boutwell *v.* Tyler, 11 Vt. 487; Smith *v.* Brush, 11 Conn. 359; Bill *v.* Porter, 9 Conn. 31; Arnold *v.* Greene, 8 John. (N. Y.) 79. If a charge upon book was not originally proper, the parties may make it so by their conduct, assent or agreement. Spear *v.* Peck, 15 Vt. 566; Daton *v.* Whitcomb, 17 id. 641. In Darlington *v.* Taylor, 2 Grant's Cas. (Penn.) 195, the court held that a shop book, even though the entries are not original, and some of the items not the subject of book charge, is competent evidence if it has been shown to the debtor without objection on his part.

Services *performed* are a proper subject of book charge, in whatever capacity they may have been rendered.[1] Thus services rendered by an attorney,[2] a justice of the peace,[3] or indeed by any person in whatever capacity, where there is either an express or an implied promise to pay therefor.[4] And this is also the rule as to services rendered by horses, cattle, etc.[5]

But as, in the case of goods sold, it must appear that they were actually delivered before they can properly be charged on book, so in the case of services *it must be shown that they have been actually performed.*[6]

Where an agreement by certain parties to loan certain sums of money to aid in the building of a hotel, provided that W. and others should be the attorneys in fact of the subscribers, empowered to contract with a suitable person to execute the purpose of the agreement, and collect and disburse the amounts subscribed, and they entered into a contract with S. to build such hotel, and W., who was a banker, was made their treasurer, it was held that the entries in the books of W. were not admissible to charge S. with the receipt of the subscriptions, in an action against him by a subscriber to recover the amount of an alleged payment. An entry in a book of accounts, which is the principal fact upon which the right to recover is based, is not admissible as being part of the *res gestæ*. In such case, certificates to subscribers issued by the attorneys in fact, acknowledging the payment of subscriptions to the loan, would not be competent to conclude S. therein. Nor would a receipt executed by S. to W. for a sum less than the whole amount subscribed, which did not specify the names of the parties from whom W. had received

[1] Hawell *v.* Barden, 3 Dev. (N. C.) 449.

[2] Charlton *v.* Lawry, 1 Martin (N. C.), 44; Bell *v.* McLean, 3 Vt. 185.

[3] Sargeant *v.* Pettibone, 1 Aik. (Vt.) 355.

[4] Minor *v.* Irving, 1 Kirby (Conn.), 158; Foy *v.* Slyfield, 3 Vt. 246; Bamers *v.* Dunn, 2 Root (Conn.), 59. But see Harbison *v.* Hawkins, 81 Penn. St. 142, where it was held that a charge by a notary public for services in taking depositions and the acknowledgment of a deed, were not proper subjects of book charge.

[5] Easly *v.* Eaken, 1 Cooke (Tenn.), 38; Boardman *v.* Keeler, 2 Vt. 65; Phenix *v.* Prindle, 1 Kirby (Conn.), 207.

[6] Hawell *v.* Barden, *ante.*

the money, be admissible to establish the fact that S. had received the amount pledged by any one subscriber.[1]

There are many matters which may become the proper subject of book charge by the agreement of parties, or by their usual course of dealings, which otherwise would not be; therefore when an item in an account is objected to as not being properly chargeable upon book, the party may show, if he can, that it was agreed between the parties that it should be so charged, *or that charges are warranted by the usual course of dealing between the parties.* Thus, where there is a special contract in writing between the parties, it cannot, nor can any of its incidents, properly be made the subject of book charge, as interest accruing upon a note, contract, bond, etc.; *but if the parties so agree, or if such charges, relating to the same contracts between the same parties, have formerly been made upon the party's book, and settled by the other party without objection*, such charges afterwards made, as between the parties, and *growing out of the same contracts*, would doubtless be regarded as proper, and the same may be said as to rent for the use of lands, etc.,[2] because in such a case the parties have established a species of usage as between themselves which is operative until destroyed by the objection of the other party.

Nothing which grows out of a collateral agreement can be made the subject of book charges. Thus, where goods are furnished to A. under an agreement by B. to pay for them if A. does not, the goods cannot be charged to B. in account, but the remedy of the party is upon the special agreement.[3] Nor can any mere claim for damages arising out of a special contract or from the neglect, default, or miscarriage of another, be made the subject of a book charge,[4] nor can goods left with a person to be sold on commission,[5] nor damages arising from a tort.[6]

[1] Sypher *v.* Savery, 39 Iowa, 258.

[2] Case *v.* Berry, 3 Vt. 332; Beach *v.* Mills, 5 Conn. 493; Swing *v.* Sparks, 7 N. J. L. 59; Spear *v.* Peck, 15 Vt. 566; Darlington *v.* Taylor, *ante.*

[3] In Skinner *v.* Conant, 2 Vt. 75, this rule was adopted under a similar collateral agreement relating to services.

[4] Fry *v.* Slyfield, 3 Vt. 75; Farrand *v.* Gage, 3 Vt. 326.

[5] Brisch *v.* Hoff, 1 Yeates (Penn.), 198; Kerr *v.* Love, 1 Wash. (U. S. C. C.) 172.

[6] Swing *v.* Sparks, 7 N. J. L. 59.

Sec. 145. Time of Making Entries, Etc.

It is no objection to a book that the entries are made by the party from data furnished him by his workmen, *if he knows* the facts therein stated. Thus, in a Pennsylvania case,[1] the party saw his lime, in general, either loaded at the kiln or delivered to the vendees, but not always, and trusted to his wagoners for some of his charges; yet his book of charges for the lime was allowed to go to the jury. In another case, a butcher's servant, carrying out meat, uniformly marked in pencil the quantity delivered, which his master copied into his book on his return. The book was held receivable.[2] So, where one of two butchers (partners) customarily marked the scores of meat with chalk on a cart, and the other, before the cart went out again, copied the scores into the book, it was held receivable, on the oath of both partners.[3] It is no objection to the book, though the entries be first made on a slate and then transcribed by the party, if done in the ordinary course of his making such entries,[4] though properly they should be transcribed daily; and where it was left in doubt, whether a day or two after, they were rejected;[5] and they will, of course, be rejected if it do not appear that the party made the entries on the slate, but it is left to be inferred that they were made by a servant, who could attest to them himself.[6] And where the journeyman made the entries, some of them on a slate, whence they were copied by the master — some in a day or two, some in a week, some perhaps not short of two weeks, without distinguishing which was longer or shorter, the book was held altogether inadmissible. And much stress was laid on there being better evidence — the journeyman himself; they should at least have been both made and transcribed at or about the time the work was done; and the party should distinguish the entries so made from those made more loosely,

[1] Curran *v.* Crawford, 4 S. & R. (Penn.) 3.

[2] Ingraham *v.* Bockius, 9 S. & R. (Penn.) 285. But see Smith *v.* Lane, 12 S. & R. (Penn.) 80.

[3] Smith *v.* Sandford, 12 Pick. (Mass.) 139.

[4] Faxon *v.* Hollis, 13 Mass. 427; Kessler *v.* M'Conachy, 1 Rawle (Penn.), 441.

[5] Ogden *v.* Miller, 1 Browne (Penn.), 147.

[6] Drummond *v.* Hyams, 1 Harp. (S. C.) 268.

or the whole must be rejected.[1] A book is receivable as evidence, though the work be charged while in progress, and before it be completed; as where a tailor made his charges on the work being cut out and delivered to his journeymen, who worked in the same house with him. Such mode of keeping books as is usual and known to all tradesmen cannot safely be declared bad by the court. In some trades the work is in hands for several days, and goes through more than one hand; and the entry may be made during the period of its manufacture, or at a stated time when it has progressed a certain length. The court would not say a shopkeeper could charge goods not yet measured or weighed off, nor a tradesman work not yet begun; but they hesitated to say that a blacksmith who has prepared and weighed iron work, and then charges before he puts it on the wood, which might take him a week, or a chairmaker who makes and paints the chairs and charges them before sent to be gilt, shall not read his book.[2]

The entry must be in the book of the party, kept by him for the purpose of his daily accounts, generally, with all those persons who may have dealings with him, and must be made in conformity to the prevalent manner of his keeping the book, and in a regular course with the other charges. If they stand isolated on the front leaf of the book, and not falling into a regular order with the other charges, they will be rejected.[3] So if on a separate sheet, especially when it appears that the party in fact keeps an account book.[4] So of a mutilated piece of paper, which appears to have been torn out of a book, in which the name of neither party appears, which contains no charges against the defendant, and which is unintelligible without explanation by the plaintiff.[5] Where six charges, amounting to six hundred and fifty dollars, were on one of the last leaves of the book, separated from all the entries by intervening blank leaves, and dated

[1] Kessler *v.* M'Conachy, 1 Rawle (Penn.), 441.

[2] Kaughley *v.* Brewer, 16 S. & R. (Penn.) 133.

[3] Lynch *v.* Hugo, 1 Bay (S. C.), 33.

[4] Prince *v.* Smith, 4 Mass. 455.

[5] Hough *v.* Doyle, 4 Rawle (Penn.), 291.

during the same period with thirteen other charges made in the body of the book, apparently regular, the six charges were held properly to be no part of the book, and inadmissible, the same as entries on a separate leaf.[1] Charges on several disconnected pieces of paper were rejected.[2] After the defendant's demand accrued against the plaintiff, the latter caused a series of charges to be continuously written down in his regular book against the defendant, ranging through several years, without a single intervening charge. The book was held clearly inadmissible as evidence of such charges.[3] But in Vermont, an entry of a service as counselor at law on a separate slip of paper, filed according to the party's usual practice, was received.[4]

To make the book admissible for any purpose, it must contain the original entries of the party made by himself, and must be an account of his daily transactions.[5] And one reason why they must not appear to be made by another is, because he is then *prima facie* a witness, and must be produced.[6] But regard is had to the party's degree of education, and if he cannot write so as to make entries, they may be made by another.[7] If it clearly appear that the entries are not original, either upon inspection or from extrinsic testimony, they are to be withheld as incompetent evidence.[8] Being original entries, the question arises upon the form in which they are to be kept. Among the European continential nations, which have adopted the civil law as the basis of their own, this proof by book account also prevails. If we judge of its form from the French Code, and the more approved French writers on jurisprudence, who confine it to merchants of good standing, it will be seen that the avenues

[1] Wilson *v.* Wilson, 4 N. J. L. 94.

[2] Thompson *v.* McKelvey, 13 S. & R. (Penn.) 126.

[3] Swing *v.* Sparks, 7 N. J. L. 59.

[4] Bell *v.* M'Lean, 3 Vt. 185.

[5] Curren *v.* Crawford, 4 S. & R. (Penn.) 5; Sterritt *v.* Bull, 1 Binn. (Penn.) 237; Prince *v.* Smith, 4 Mass. 455; Eastman *v.* Moulton, 3 N. H. 156; Swing *v.* Sparks, *ante;* Karr *v.* Stivers, 34 Iowa, 123; Marsh's Case, 30 Wis. 531.

[6] Eastman *v.* Moulton, 3 N. H. 156.

[7] Prince *v.* Smith, 4 Mass. 455; Eastman *v.* Moulton, 3 N. H. 156.

[8] Cogswell *v.* Dolliver, 2 Mass. 222; Curren *v.* Crawford, 4 S. & R. (Penn.) 3; Prince *v.* Smith, 4 Mass. 455; Swing *v.* Sparks, 7 N. J. L. 59.

to abuse are partially closed by the cautious manner in which accounts must be arranged and checked in order to give them the character of competent proof.[1] Yet the book itself is not such evidence as will warrant a sentence in favor of the party producing it.[2] It is but semi-proof, which may be rendered perfect by the suppletory oath of the party. But in many of the States of this country, where this kind of evidence is left to be framed by citizens of every occupation and every variety of language and character, and that, too, in their own way, any considerable degree of safety derived from the forms of book-keeping is the last thing to be expected. Yet books are rarely rejected for a defect of form, even in those States where they are not brought down to semi-proofs, and where, in the hands of inexperienced tribunals, it is almost of course that, being received, they should reach the effect of *prima facie* evidence. Being the original or first entries of the party in his own hand, these books are the least suspicious when kept in the form of daily entries in a single journal or day-book, of the debts and credits of the different persons with whom the party deals, in the order of dates, without blanks, chasms or marginal references. In France, if any of these requisites are wanting, the book is not competent evidence.[3] This is the most perfect form, and one which has never been questioned in the American courts, where book accounts are received in any way. But generally they do not require anything like these formalities in order to render books competent. At least, the entries should, in all cases, be strongly and clearly confirmed by common-law evidence, even where the oath of the party is required. Still they are competent, that is to say, they stand something above zero, though they may come short of the standard of credibility. One striking instance is in receiving entries kept ledgerwise; that is to say, where the account of each man dealing with the party is kept by itself, in a separate department of the book; thus affording every

[1] Code de Com. Liv. 1, tit. 2; des Livres de Commerce, art. 12; Poth. des Obl. nos. 719, 720.

[2] 1 Dom., p. 444, b. 3, tit. 6, § 3, art. 9.

[3] Code de Com. tit. 2; des Livres de Commerce, art. 8, 10.

facility for undetected interpolation, either *ante* or *post litem motam*. Yet such books are receivable.[1] Books thus kept were received, though the entries in question were intermixed with various charges, notes, receipts and memoranda relating to the party's dealings with others, in whatever blank spaces he happened to find, without any regard to the order of dates or pages.[2]

But whether in a day-book or ledger form, the entries must appear to have been made daily, or they cannot be admitted.[3] If it appears at any stage or in any way, that charges arising at different dates were in fact made at the same time, the book is not evidence.[4] It must also be apparent that the entries were intended as book charges, in account with the identical party against whom they are offered in evidence.[5] If they are kept merely as a memorandum between the party and another, they are inadmissible.[6] Arbitrary marks fixed to the entries, not intended to charge the vendee, but merely to inform the porter and prevent a delivery of similar articles twice, cannot be used to aid in the evidence of delivery, especially if not always made by the same person making the residue of the entry, nor by the party nor his clerk.[7] So, a book kept by a forgeman to settle by with his customers, though it name the vendees, and sometimes the price, is not evidence against the latter.[8] It is not an insurmountable objection to the competency of the book, that there be erasures and corrections. Its character is not thus destroyed as a book of original entries. The alteration is open to explanation, and the objection goes to the credit only.[9] But it is a serious objection against its credit; and if gross, sus-

[1] Swift's Ev. 81, 82; Rodman *v.* Hoop's Ex'rs, 1 Dall. (U. S.) 85; Faxon *v.* Hollis, 13 Mass. 427; Wilson *v.* Wilson, 6 N. J. L. 94; Cogswell *v.* Dolliver, 2 Mass. 217.

[2] Cogswell *v.* Dolliver, 2 Mass. 217.

[3] Eastman *v.* Moulton, 3 N. H. 156; Smith *v.* Lane, 12 S. & R. (Penn.) 80.

[4] Eastman *v.* Moulton, 3 N. H. 156.

[5] Rhoades *v.* Gaul, 4 Rawle (Penn.), 404; Rogers *v.* Old, 5 S. & R. (Penn.) 404; Smith *v.* Lane, 12 id. 80.

[6] Smith *v.* Lane, 12 S. & R. (Penn.) 80.

[7] Rhoades *v.* Gaul, *ante*.

[8] Rogers *v.* Old, 5 S. & R. (Penn.) 404.

[9] Sargeant *v.* Pettibone, 1 Aik. (Vt.) 355.

picious, or unexplained, it will destroy the competency of the book. And so of any other fraudulent appearances.[1] Not only the day-book, but, if it be posted, the ledger must be produced, that it may be seen what credits there are. This was held where post-marks appeared on the day-book.[2] And it is the same in whatever way the fact of posting may be made to appear. The book being competent as a whole, almost any series of figures, abbreviations and words, which can be explained into a signification, will do for particular charges, and regard is always to be had to the party's degree of education, the nature of his employment, and the manner of his charges against others.[3] But the charges must be specific; that is to say, they must denote the particular work or service charged, as it arises daily, and the quantity, number, weight, or other distinct designation of the materials or articles sold or furnished, and attach the price or value to each item.[4] Accordingly, a bricklayer's charge of "190 days' work" was rejected; it should be placed in the book daily, being entered at the time as it occurs;[5] and a physician's charges "for medicine and attendance," and another thus: "thirteen dollars for medicine and attendance on one of the general's daughters in curing the whooping cough," were also rejected as too indefinite.[6] But this is a matter which must reside very much in the discretion of the judge, to be exercised according to the nature of the subject, and its susceptibility of being precisely charged. Where, within this rule, to be applied on the examination of witnesses and otherwise, the charge is sufficiently specific, it will be received; and such was the course in judging of a physician's bill and admitting it.[7] A receipt in the account book, purporting to be signed by the vendee, is not receivable in proof

[1] Eastman *v.* Moulton, 3 N. H. 156.

[2] Prince *v.* Sweet, 2 Mass. 569; Eastman *v.* Moulton, 3 N. H. 156.

[3] Prince *v.* Smith, 4 Mass. 455.

[4] Hughes *v.* Hampton, 2 Const. Rep. (S. C.) 745; Lance *v.* M'Kenzie, 2 Bail. (S. C.) 449; Lynch *v.* Petrie, 1 N. & M'Cord (S. C.), 130; Hagaman's Case, 4 N. J. L. 370.

[5] Lynch *v.* Petrie, *ante*.

[6] Hughes *v.* Hampton, 2 Const. Rep. (S. C.) 745.

[7] Schmidt *v.* Quin, 1 Rep. Const. (S. C.) 418.

as an original entry.[1] If the prices are not carried out, the books are imperfect, and if admissible at all, prove nothing as to the price, and the jury cannot guess at that; so the charge goes virtually for nothing.[2] We have already seen that, so far from being primary evidence, superior in degree to the mere oral testimony of disinterested witnesses, books are treated by the cases, according to their true character, as evidence secondary to common-law proof. It was in one case hastily held that the party's book must be produced like any other written evidence, as standing higher upon the scale, or that its absence must be accounted for, before proof by witness should be received.[3] When the party is sworn, the book must be produced, for there it is the principal evidence;[4] and if it be lost, the party loses his oath.[5] In such a case, the contents of the book may be proved; but this must be by common-law evidence, though the party made the entry himself. If proved by another who made the entries, the book must be in court, or its absence accounted for: and so where the entries of a third person, deceased, are the subject of proof. In such case, the contents of the paper itself being in question, they must be proved like those of any other paper, by itself, if it can be had. Nor will the excuse that the party resides at a great and inconvenient distance, be received.[6] The rule as to showing the contents of documents by themselves only has been applied to account books by several cases.[7] But extracts from the books of foreign merchants, verified by the oaths of their clerks, were received, the court saying it would be unreasonable to require the books themselves.[8] It is well settled, that a party may, in his discretion, waive his books altogether, and rely upon

[1] Sterritt *v.* Bull, 1 Binn. (Penn.) 234.

[2] Hagaman's Case, 6 N. J. L. 370.

[3] Kelly *v.* Holdship, 1 Browne (Penn.), 36.

[4] Nicholson *v.* Withers, 2 M'Cord (S. C.), 428.

[5] Prince *v.* Smith, 4 Mass. 455.

[6] Smith *v.* Peay, 2 Bail. (S. C.) 394.

[7] Keller *v.* Ord, 1 Dall. (U. S.) 310; Herring *v.* Levy, 4 Mart. (La. N. S.) 383; Smith *v.* Peay, 2 Bail. (S. C.) 394; Nicholson *v.* Withers, 2 M'Cord (S. C.), 428.

[8] Bell *v.* Keely, 2 Yeates (Penn.), 255. And see Lewis *v.* Bacon, 3 H. & M. (Va.) 89. See Elms *v.* Cheevis, 2 M'Cord (S. C.), 349.

his common-law proof, by witnesses or otherwise.[1] The party may take his account and proof from his adversary's book. But the non-production of his own book would many times, and especially if called for by his adversary, be a heavy circumstance against him.[2] Books are evidence, both of the items charged and the price or value carried out, subject to inquiry on other evidence.[3] Properly attested, they are *prima facie* evidence of the delivery of articles of merchandise —[4] indeed, both of sale and delivery; and in case of services, they are evidence of retainer to do the service, the doing of it, and the delivery of materials in the course of the service.[5] The book is to be taken together, with its charges and credits, especially where both are of the same date.[6] The party's books would be admissible on a collateral point in a cause, as if, in an action to recover money from the defendant, it should be material to determine the state of his accounts with another.[7] But it was afterwards held that, the third person being himself a witness, and his oath better evidence than his books, he should be produced. The case would not then come within the necessity on which this kind of proof is founded.[8] Entries made upon loose sheets of paper are not to be presumed to have been made as daily minutes of the parties' business transactions, and are not admissible in evidence. To render a book evidence, it must appear to have been regularly kept in such a manner as to afford a strong presumption of its accuracy; in other words, the charges in the handwriting of the party must appear in such a state that they may be presumed to have been his daily minutes of his transactions and business.[9] But if the book account

[1] Levenworth *v.* Phelps, Kirby (Conn.), 71; Cambioso *v.* Maffett, 2 Wash. (U. S. C. C.) 101; Nicholson *v.* Withers, 2 M'Cord (S. C.), 428; Read *v.* Barlow, 1 Aik. (Vt.) 145, 147, 148, *per* SKINNER, C. J.; Palmer *v.* Green, 6 Conn. Rep. 14, 17; Bernham *v.* Adams, 5 Vt. 313; Whiting *v.* Corwin, 5 Vt. 451.

[2] Palmer *v.* Green, 6 Conn. 14.

[3] Ducoign *v.* Schreppel, 1 Yeates (Penn.), 347.

[4] Foster *v.* Sinkler, 1 Bay (S. C.), 45.

[5] M'Bride *v.* Watts, 1 M'Cord (S. C.), 384.

[6] Harrington *v.* Hall, 2 Aik. (Vt.) 175.

[7] Mifflin *v.* Bingham, 1 Dall. (U. S.) 272.

[8] Juniata Bank of Pennsylvania *v.* Brown, 5 S. & R. (Penn.) 226.

[9] Richardson *v.* Emery, 2 N. H. 220.

appears to have been regularly kept, and the charges were made at or about the time the work was done, or materials found, it will not be rejected merely because it is proved by the party's suppletory oath that the entries were not invariably made on the same day the work was done, or articles furnished.[1] Neither the manner nor the form in which the book is kept is material, so that it appears to have been fairly and honestly kept ; thus, an account for work, entered on one leaf of a book with no intervening charges, is admissible, supported by the suppletory oath of the party, though the entry is in pencil.[2]

[1] Morris *v.* Briggs, 3 Cush. (Mass.) 342.

[2] Gibson *v.* Baily, 13 Met. (Mass.) 537.

CHAPTER XIV.

RES GESTÆ.

SECTION.

146. What is General Rule.
147. Bodily Suffering or Mental Anguish.
148. Statements made by Applicant for Life Insurance.
149. Statements made before the Principal Fact.
150. Illustrations of the Rules relating to.
151. How far Acts and Sayings of Parties to a Written Contract at the Time of Making it, are Admissible.
152. Declarations as to Possession of Lands.
153. Spontaneity of the Acts or Declarations, what is.
154. Acts, etc., Before and After the Principal Facts.
155. Illustration of the Rule relating to *res gestæ*.
156 Declarations of Conspirators, when Evidence against co-conspirators.
157. Statements of Conspirators, when not part of the *res gestæ*.
158 Writings in possession of Conspirators, before or after apprehension.

Sec. 146. What is General Rule.

It is a well-settled rule of evidence that the declarations and acts of the principal parties to an act, as well as the circumstances surrounding them and accompanying the transaction at the time of the principal fact, may be given in evidence in a controversy between the parties relative thereto as a part of the *res gestæ*, which are calculated to show the nature of the act, and are in harmony with it. *But in order to be admissible they must be immediately connected with the material inquiry involved in the issue, and must have occurred at the time of the transaction, or if not precisely concurrent, so closely connected therewith that they may be said to spring from it, and thus tend to explain it. They must be so closely connected with the principal act in point of time as to be spontaneous and voluntary, and to preclude all possible idea of deliberate design.* Indeed, it has been said that the declarations or acts must be the natural or inseparable concomitants of the principal fact in contro-

versy, so that they may be presumed to have been induced by the same motive that led to the act itself, and so closely allied thereto in point of time as obviously to form a part of the transaction, and must be calculated to unfold its nature and quality. If there is anything which raises a suspicion that they were intended to deceive, and were made or done in bad faith, the court not only *may*, but should, exclude them.[1]

[1] Riggs *v.* State, 6 Cold. (Tenn.) 517; Elkins *v.* Hamilton, 20 Vt. 627; Carter *v.* Buchanan, 3 Ga. 513; Fifield *v.* Richardson, 34 Vt. 410; Atherton *v.* Tilton, 44 N. H. 452; Meek *v.* Perry, 36 Miss. 190; Springer *v.* Droach, 32 Ind. 486; Crowther *v.* Gibson, 19 Mo. 365; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; Koch *v.* Howell, 6 W. & S. (Penn.) 350; Clayton *v.* Tucker, 20 Ga. 452; Curtis *v.* Avon, &c., R. R. Co., 49 Barb. (N. Y.) 148; Stewart *v.* Hanson, 35 Me. 506; Clark *v.* Rush, 19 Cal. 393; Russell *v.* Frisbee, 19 Conn. 205. And this is applicable to actions civil or criminal. Hamilton *v.* State, 36 Ind. 280. If a declaration is in itself a *fact* in the transaction, or is made by a person while doing an act, and serves to explain it, it is a part of the *res gestæ;* but if it is merely a recital of a past transaction, it is not, although it may have some relation to an act which a person may be doing when he makes such declaration. Haynes *v.* Rutter, 24 Pick. (Mass.) 242; Bank *v.* Kennedy, 17 Wall. (U. S.) 19; People *v.* Brotherton, 47 Cal. 388; Sill *v.* Reese, id. 294; Landell *v.* Hotchkiss, 4 N. Y. Sup. Ct. 685; Burlew *v.* Hubbell, 1 id. 235; Parker *v.* R. R. Co., 109 Mass. 449; Jordant *v.* Osgood, id. 457. Declarations or circumstances accompanying an act in controversy, may be proved in a proper case, as connected with and explanatory of the principal act, although they might not be admissible as independent evidence. Hoyer *v.* Stevens, 1 Woodb. & M. (U. S. C. C.) 290; Jones *v.* Brownfield, 2 Penn. St. 55; United States *v.* Omeara, 1 Cranch (U. S. C. C.), 165; Webb v. Kelly, 1 Ala. 349; Yarborough *v.* Moss, 9 Ala 382; Hoper *v.* Edwards, 20 Ala. 528; Sanford *v.* Howard, 29 Ala. 684; Bragg *v.* Massie, 38 Ala. 89; Cornelius *v.* State, 12 Ark. 782; Robinson *v.* Lane, 19 Ga. 337; Rigg *v.* Cook, 9 Ill. 336; Strange *v.* Donohue, 4 Ind. 327; Austin *v.* Swank, 9 Ind. 109; Franklin *v.* Woodland, 14 La. Ann. 188; Corinth *v.* Lincoln, 34 Me. 310; Stewart *v.* Hanson, 35 Me. 506; Duvall *v.* Medtart, 4 H. & J. (Md.) 14; Curtis *v.* Moore, 20 Md. 93; Elliott *v.* Stoddard, 98 Mass. 145; Plumer *v.* French, 22 N. H. 450; Johnson *v.* Elliott, 26 N. H. 67; Tucker *v.* Peaselee, 36 N. H. 167; State *v.* Huntley, 3 Ired. (N. C.) L. 418; Slitt *v.* Wilson, Wright (Ohio), 505; Wetmore *v.* Mell, 1 Ohio St. 26; Posterns *v.* Posterns, 3 W. & S. (Penn.) 127; Hood *v.* Hood, 2 Grant (Penn.) Cas. 229; Rees *v.* Livingston, 41 Penn. St. 113; Turpin *v.* Brannon, 3 McCord (S. C.), 261; Martin *v.* Simpson, 4 id. 262; Pains *v.* Jenkins, 2 Rich. (S. C.) 106; Blair *v.* Coffman, Overt. (Tenn.) 176; Kerby *v.* State, 7 Yerg. (Tenn.) 259; Evans *v.* Jones, 4 id. 461; Elkins *v.* Hamilton, 20 Vt. 627; Gillet *v.* Phelps, 12 Wis. 392. But to make the declarations of a party evidence in

In order to make declarations a part of the *res gestæ they must, in all cases, be contemporaneous with the main fact; they must have been made at the time of the act done, to which they relate, and must be well calculated to unfold the nature and quality of the facts they were intended to explain, and to so harmonize them as obviously to form one transaction.*[1]

his favor, as a part of the *res gestæ*, they must be connected with the material fact or inquiry involved in the issue. Tomkins *v.* Reynolds, 17 Ala. 109. Carter *v.* Buchanan, 3 Ga. 573; McKee *v.* People, 36 N. Y. 113; Mitchum *v.* State, 11 Ga. 615; Cole *v.* Cheshire, 1 Gray (Mass.), 441; Mason *v.* Palmer, 8 Allen (Mass.), 337; People *v.* Vernon, 35 Cal. 9; Hundy *v.* Johnson, 5 Md. 450; Wright *v.* Boston, 126 Mass. 161; Sessions *v.* Little, 9 N. H. 271; State *v.* Shelledy, 8 Iowa, 477; Steam Navigation Co. *v.* Dandridge, 8 Gray (Md.), 248; Cramer *v.* Shrimer, 18 Md. 140; Hall *v.* James, 3 McCord (S. C.), 222. In order to be admissible, they must be so connected with some material act as to explain or qualify it, or show the intent with which the act was done. Thus, in an action brought by A. against B. as the owner of a certain brig in which A. had shipped merchandise, for the non-delivery of such merchandise, it appeared that B. was the general owner of the brig, and that C., on the 17th of September, and before, was the authorized master; but that B., on the 18th of September, took from on board of the brig her papers and put them into the custody of D. which were never returned to the brig; and that said merchandise was shipped after this transaction. B. claimed that he, at this time, revoked the authority of C. as master; and that C. then surreptitiously obtained other papers, and ran off with the vessel, sailing her without any authority from B. To establish this claim, B. introduced, with other evidence, the testimony of D., that B., when he delivered the papers to him, said that "C.'s wife intended to go in the brig, and if so, he was fearful there would be difficulty, and he could not let the vessel go; he did not want the vessel to go to sea, if C.'s wife was going in her." It was held that these declarations, so made, were admissible for the purpose for which they were offered. Russell *v.* Frisbie, 19 Conn. 205. But where there is no *immediate* connection between the act and the declaration, it cannot be regarded as a part of the *res gestæ*. Thus, where a party, having taken up and removed an ancient fence, put down a stone in one of the post-holes, where it remained, and the next day he declared that he put it there as a bound, it was held, that this declaration was not so connected with the *act done* as to constitute a part of it, and was, therefore, inadmissible evidence for such party. Noyes *v.* Ward, 19 Conn. 250.

[1] HOSMER, J., in Eves *v.* Tuttle, 3 Conn. 250; Mitchum *v.* State, 11 Ga. 615. *Res gestæ*, says the court in Carter *v.* Buchanan, 3 Ga. 513, *are the circumstances, facts and declarations which grew out of the main fact, are contemporaneous with it, and serve to illustrate its character.* Where the question was, whether certain property taken under execution belonged to the judgment debtor, it was held that

The entire value of this class of evidence depends upon its spontaneity, and is predicated upon the idea that *being spontaneous*, springing from the act itself, and forming a part of it in point of time, before any idea of deliberate design or purpose to make evidence for each other has entered the minds of the parties, it tends to explain, unfold and throw light upon the transaction.

Sec. 147. Bodily Suffering or Mental Anguish.

It is for this reason, and upon this ground, that the declarations of a party who has been injured and is suffering

statements by the debtor to a clerk employed by him, as to whom he was employed for, were admissible as part of the *res gestæ*. Statements by the party in possession of certain property, that the business was his, and was only run in his father's name for protection, were held inadmissible, as being something more than merely explanatory of the possession. Sweet *v.* Wright, 57 Iowa, 510. The declaration of a person in possession of land, that he took possession as agent of another, is admissible in evidence as a part of the *res gestæ* in action against his alleged principal. Kirkland *v.* Trott, 66 Ala. 417. Upon the trial of an issue as to whether certain notes were paid, the testimony of the party claiming to have paid them, that, in the absence of the other party, he threw them into a stove, calling the attention of bystanders to the fact that they were the notes in controversy, is inadmissible, as is similar testimony on the part of the bystanders. Cumins *v.* Leighton, 9 Ill. App. 186. On trial of A. for rape upon B, it was held that the circumstances of an assault by A. upon C., B.'s father-in-law, when C. came to her rescue during her struggle with A., were part of the *res gestæ*, and B. might testify that C. was dead at the time of the trial. Thompson *v.* State, 11 Tex. App. 51. In an action against a constable for selling certain hogs belonging to the plaintiff, as the property of the person in possession, the declaration of such person that the hogs belonged to the plaintiff, made before the levy, was held admissible, as part of the *res gestæ*, showing the character of the possession, and as against the defendant claiming under her. Sharp *v.* Miller, 3 Sneed (Tenn.), 42. In an action upon an agreement by the defendants, that P. should account to the plaintiff for certain goods sold by the latter to P., the testimony of the plaintiff in reference to the state of accounts between him and P. was held admissible, although it necessarily introduced conversations between them, as such conversations were a part of the *res gestæ*. Fox *v.* Parker, 44 Barb. (N. Y.) 541. An action was brought upon a bond given to release a barge which had been attached to enforce a lien upon it for lumber furnished to the builder by the plaintiff. It was held that declarations of the builder's agent who purchased the lumber, made to the plaintiff while transacting the business, as to the person for whom he purchased it, and as to the amount thereof used in building the barge, were admissible as part of the *res gestæ*. Hoppy *v.* Mosher, 47 Barb. (N. Y.) 501.

from the effects of the injury, made during such period of suffering, are admissible to show the extent of such suffering.[1] Indeed, whenever the bodily or mental feelings of a person are material, the usual expression of such feelings *made at the time* in question are, as to such facts, original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory and generally the only evidence of its existence, leaving it for the jury to say whether they were real or feigned.[2] Therefore exclamations of pain,[3] and complaints of suffering, either in body or mind, resulting either from sickness or an injury to the person,[4] are treated as original evidence to prove the

[1] Illinois, &c., R. R. Co. *v.* Sutton, 42 Ill. 438; Gray *v.* McLaughlin, 26 Iowa, 279; Jex *v.* Board of Education, 1 Hun (N. Y.), 157; Burnham *v.* State, 38 Tex. 662.

[2] Phillips *v.* Nully, 29 Ala. 628; Hyatt *v.* Abrams, 16 Mich. 180; Howe *v.* Plainfield, 41 N. H. 135; Perkins *v.* Concord, 44 N. H. 223; Kent *v.* Lincoln, 32 Vt. 591; People *v.* Williams, 3 Parker Cr. (N. Y.) 84; Stone *v.* Watson, 1 Ala. Ld. Cas. 236; Caldwell *v.* Murphy, 11 N. Y. 416; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200; Baker *v.* Griffith, 10 id. 140; Lusk *v.* McDaniel, 13 Ired. (N. C.) L. 485.

[3] Hyatt *v.* Adams, 16 Mich. 180. In this case exclamations of pain uttered by a patient were held to be original evidence of suffering and admissible to show malpractice on the part of a physician, but not for the purpose of aggravating the damages.

[4] Howe *v.* Plainfield, *ante*. Such expressions are regarded as natural evidence, and are to be submitted to the jury, with all the circumstances attendant upon their expression, to determine whether they are real or feigned, and to give them such weight as they may deem them entitled to in view of all the attendant circumstances. Gray *v.* McLaughlin, 26 Iowa, 279; Phillips *v.* Kelley, 29 Ala. 628; Johnson *v.* State, 17 id. 618; Looper *v.* Bell, 1 Head. (Tenn.) 373. And if such statements are made, after the action for damages is commenced, to a physician, to enable him to form a medical opinion as to the patient's condition, such statements are competent as a part of the *res gestæ;* but the time when they were made may detract from their weight. Barber *v.* Merrian, 11 Allen (Mass.), 322; Towle *v.* Blake, 48 N. H. 92; Taylor *v.* Gr. Trunk R. R. Co., id. 304. So it has been held, in an action against a physician for malpractice, that exclamations of pain uttered by a patient may be given in evidence as a part of the *res gestæ*, for the purpose of establishing the claim, but not in aggravation of the damages. Hyatt *v.* Adams, 16 Mich. 180. And indeed it may be stated generally that the statements of a sick or injured person as to the nature, symptoms, or extent of the disease or injury, are always admissible to show his actual condition at the *time* when they are made. They must not relate to the *past* condition of the person, but to his real condition at the time when the declarations are

fact and extent of suffering, but not to prove the *cause* there-

made. Hunt *v.* People, 3 Park. Cr. (N. Y.) 569; People *v.* Williams, id. 84; Perkins *v.* Concord R. R. Co., 44 N. H. 223; Stone *v.* Watson, 1 Ala. Sel. Cas. 236; Baker *v.* Griffin, 10 Bosw. (N. Y. Superior Ct.) 140; Caldwell *v.* Murphy, 11 N. Y. 416; Denton *v.* State, 1 Swan (Tenn.), 297; Kent *v.* Lincoln, 32 Vt. 591; Bacon *v.* Charlton, 7 Cush. (Mass.) 581; Lush *v.* McDaniel, 13 Ired. (N. C.) 485; Earl *v.* Tupper, 45 Vt. 275; Spatz *v.* Lyons, 55 Barb. (N. Y.) 476; Insurance Company *v.* Mosley, 8 Wall. (U. S.) 387. But it is held that the declarations of a person under such circumstances as to the *manner* in which it occurred, however contemporaneous with the act itself, are not admissible. State *v.* Davidson, 30 Vt. 377. But it seems that the *cause* of the injury may be proved by declarations of a party injured, so nearly allied, as to the time of making them, with the injury itself, that they may fairly be regarded as a part of the *res gestæ*. Stiles *v.* Danville, 42 id. 282. In Quaife *v.* Chicago and Northwestern Railway Co., 48 Wis. 513, it was held that in an action of damages for personal injuries by negligence, the plaintiff having at the defendant's request submitted to a physical examination by surgeons, testimony that, judging from the examination, including what she said at the time, and her indications of suffering, the injury complained of existed, was admissible, although the witness swore he could discover no external evidence of it. This is based on Barber *v.* Merriam, 11 Allen (Mass.), 322, where BIGELOW, C. J., says: "The opinion of a surgeon or physician is necessarily formed in part on the statements of his patient, describing his condition and symptoms, and the causes which have led to the injury or disease under which he appears to be suffering. This opinion is clearly competent, as coming from an expert. But it is obvious that it would be unreasonable, if not absurd, to receive the opinion in evidence, and at the same time to shut out the reasons and grounds on which it was founded. Such a course of practice would take from the consideration of court and jury the means of determining whether the judgment was sound, and his opinion well founded and satisfactory. * * * The party producing the witness, and who relies on his opinion, should be allowed the privilege of showing that his testimony, as an expert, is the result of due inquiry and investigation into the condition and symptoms of the patient, past and present. * * * The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the conditions of health or disease is founded." And at p. 326 he says: "It is suggested, in behalf of the defendant, that the statements in the present case were made by the plaintiff after the commencement of the action. But we do not think that for this reason only they ought to have been rejected. It was a circumstance which may have detracted from the weight of the evidence of the opinion of the physician, so far as it was founded on these statements. But as the statements were made to a medical man, for the purpose of receiving advice, they were competent and admissible." The same doctrine is held in

of, unless made at such a time as to entitle them to be regarded as a part of the *res gestæ*.[1]

Matteson *v.* N. Y. Cent. R. R. Co., 35 N. Y. 487. The injury occurred on the 7th of July, and consisted in concussion of the spine. Declarations made by the injured person in the following October, after suit brought, to physicians while they were examining her to ascertain her condition, were held admissible in her behalf. The court said: "Her complaints and representation of pain and suffering, together with appearance and conduct, necessarily formed the basis of their judgment." "This is the case notwithstanding the examinations referred to were made by the physicians after the suit was commenced, and with a view as to their testifying therein as to the result of their examinations. It does not appear that the patient knew that such was their object, and if she did know it, the jury were to judge whether her representations were false or her testimony conclusive." So, in Brown *v.* N. Y. Cent. R. R. Co., 32 id. 597, testimony that the injured party complained "all the time since the injury," was held admissible. To the same effect Caldwell *v.* Murphy, 11 id. 416, where the complaints were made during ten or eleven days after the injury, and in Werely *v.* Persons, 28 id. 344, where they were made during two or three weeks after the injury. In Aveson *v.* Kincaid, 6 East, 188, it was held that the complaints and statements of the injured party at the very time of the occurrence, not only as to bodily suffering, but as to the circumstances of the occurrence, are admissible as *res gestæ*. Second. That the statements of the injured party subsequently and not substantially at the time of the occurrence, as to the circumstances of the occurrence, are not admissible, whether made to a physician or to a non-expert. Third. Complaints and statements of the injured party as to his present physical condition, although subsequently to the occurrence and indeed after suit is brought for the injuries, are admissible, whether made to a physician or to one who is not an expert. Lush *v.* McDaniel, 13 Ired. (N. C.) 485; Chapin *v.* Marlborough, 9 Gray (Mass.), 244; Goodwin *v.* Harrison, 1 Port. (Ala.) 80; Kennard *v.* Burton, 25 Me. 39; Denton *v.* State, 1 Swan (Tenn.), 279.

[1] Gray *v.* McLaughlin, 26 Iowa, 279; Matterson *v.* N. Y., &c., R. R. Co., 35 N. Y. 487; Kennard *v.* Burton, 25 Me. 39. Such evidence may be said to be *natural* evidence, as distinguished from personal evidence. Phillips *v.* Kelly, 29 Ala. 628. In Ohio, &c., R. R. Co. *v.* Hammersley, 28 Ind. 371, upon the trial of an action brought by a father to recover for the death of his minor son, caused by the negligence of a railroad company, it was sought to introduce, on behalf of the defendants, the declarations of the son, made the day following the injury, as to the cause of the accident. It was held that the evidence was properly excluded. The son could not admit away the cause of action; nor could he, without regard to the question of minority, have released the company from any liability incurred by it to the father. If he had survived the accident, he would have been a competent witness to prove the facts; but his previous admissions could only have been given in evidence to impeach his testimony. In an action brought by

The declarations or representations of a sick or injured person as to the nature, symptoms and effect of the disease under which he is suffering are admissible as original evidence, whether they are made to a physician or any other person. Thus, in an action to recover damages for personal injuries, a physician, called as a witness, is allowed to repeat the statements of the plaintiff herself, made to him for the purpose of receiving medical advice, as to the character and seat of her injuries and sensations, they being a part of the facts on which his opinion as an expert, in regard to her condition, is founded. The fact that such statements were made after the commencement of the action, *may detract from the weight to be given to the physician's opinion, so far as founded on these statements, but does not render them incompetent.*[1]

As a matter of course, such representations made to a physician in attendance upon him are entitled to greater weight than those made to others, because he is better able to judge of their truth.[2]

Sec. 148. Statements made by Applicant for Life Insurance.

The doctrine of *res gestæ* in England has been carried so far as to hold that in an action by a husband upon a policy of insurance on the life of his wife, where the question related to the state of her health at the time when the policy was effected, a witness for the defendants was allowed to state the result of a conversation she had had with the de-

the son, the statement would have been properly introduced as an admission against himself. In People *v.* Graham, 21 Cal. 261, at the trial of an indictment for an assault, with intent to commit a rape on a young child, whose tender age prevented her from giving any material testimony, the court allowed the question to be put to the mother, "Did the child tell you *how* this occurred at the time?" and it was held that the question was not admissible, because this class of evidence is not competent to establish the *cause* of an injury.

[1] Barber *v.* Merriam, 11 Allen (Mass.), 322; Perkins *v.* Concord, 44 N. H. 223. In an action against a town for an injury sustained by reason of a defect in a highway, groans or exclamations, uttered by the plaintiff at any time, expressing present pain or agony, and referring by word or gesture to the seat of the pain, are admissible in evidence for the plaintiff. Bacon *v.* Charlton, 7 Cush. (Mass.) 581.

[2] Gray *v.* Young, 4 McCord (S. C.), 31; Aveson *v.* Kinnaird, 6 East, 188; Gilchrist *v.* Bale, 8 Watts (Penn.), 355.

ceased, shortly after the surgeon who was consulted in effecting the insurance had given a certificate of her health, in which conversation the deceased had expressed an apprehension that she should only live a few days, and had added that she had not been well from a time preceding her being examined by the surgeon. The court held that the conversation was admissible, notwithstanding the general rule which excludes the declaration of a wife as against her husband; and the more especially so, as the surgeon had been first called by the plaintiff, and had admitted that he had formed his opinion respecting her health principally from the satisfactory answers she had given to his inquiries.[1]

Sec. 149. Statements made before the Principal Fact.

On a trial for murder by poisoning, statements made by deceased in conversation shortly before he took the poison, have been received in evidence for the purpose of proving the state of his health at that time;[2] and, on the same ground, it has frequently been held, in actions or indictments for assault, that what a man has said about himself to his surgeon was evidence to show what he suffered by reason of the assault.[3] Where, upon an indictment for an abortion, the fact of a deceased party going to the respondent's house for purpose of having him commit an abortion was material, it was held that *her declarations as to her purpose in going there, made at the time of her leaving*, were competent as a part of the *res gestæ*.[4] So, where a respondent was indicted for discharging a gun at a person and wounding him, and the person injured was a witness on the trial, and it appeared that the affray took place on the premises of the respondent, it was held that the respondent might prove the declarations of the witness, made while on his way to the place where the affray happened, the witness, upon being inquired of on cross-examination, having denied them. In such case, evidence might be proper of previous threats made by the witness as to the respondent, and of previous affrays

[1] Aveson *v.* Lord Kinnaird, 6 East, 188.

[2] R. *v.* Johnson, 2 C. & Kir. 354.

[3] Aveson *v.* Lord Kinnaird, 6 East, 198, *per* LAWRENCE, J.; R. *v.* Guttridge, 9 C. & P. 472, *per* PARKE, B.

[4] State *v.* Howard, 32 Vt. 380.

between them, if so connected with the affray in question as to have any tendency to show that the respondent, at the time, had just cause of alarm, and to fear serious injury to his person or property. But where a case is so indefinitely stated upon the bill of exceptions as to leave it uncertain how far evidence offered was admissible, it will not be presumed that there was error in the court below in rejecting the evidence.[1] So, on an indictment for highway robbery, the fact that the prosecutor, a few hours after the attack made upon him, complained to a constable that he had been robbed, will perhaps be admissible, though the witness cannot be farther asked whether, on making the complaint, the prosecutor mentioned the name of the prisoner.[2] It would seem, also, that, in prosecutions for rape, proof that the woman, shortly after the injury, complained that a dreadful outrage had been perpetrated upon her, would, in the event of her death, be receivable as independent evidence;[3] and if the prosecutrix were called as a witness, such complaint would *a fortiori* be admissible as tending to confirm her credit.[4] In no case, however, can the *particulars* of the complaint be disclosed by witnesses for the prosecution, either as original, or as confirmatory evidence, but the details of the statement can only be elicited by the prisoner's counsel on cross-examination.[5] It is difficult to see upon what principle this rule is founded, where the complaint is offered as confirmatory evidence; because, if witnesses were permitted to relate all that the prosecutrix had said in making her original complaint, such evidence would furnish the best test of the accuracy of her recollection, when she was sworn to describe the same circumstances at the trial.[6]

[1] State *v.* Goodrich, 19 Vt. 116.

[2] R. *v.* Wink, 6 C. & P. 397; R. *v.* Osborne, C. & Marsh. 624.

[3] R. *v.* Megson, 9 C. & P. 420; R. *v.* Osborne, C. & Marsh. 624, *per* CRESSWELL, J. In R. *v.* Guttridge, 9 C. & P. 471, where a prosecutrix for a rape was absent from the trial, PARKE, B., rejected proof of her complaint, apparently on the ground that it was only confirmatory evidence.

[4] R. *v.* Megson, 9 C. & P. 420; R. *v.* Clarke, 2 Stark. 241; 1 East P. C. 444, 445; 1 Hale, 633.

[5] R. *v.* Walker, 2 M. & Rob. 212; R. *v.* Osborne, C. & Marsh. 622; R. *v.* Quigley, Ir. Cir. R. 677.

[6] See R. *v.* Walker, 2 M. & Rob. 212.

In actions for criminal conversation, if it is material, with the view of increasing or diminishing the damages, to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence.[1] But to guard against the abuse of this rule, it must be proved by some evidence independent of the date appearing on the face of the letters,[2] that they were written by the wife to the husband prior to any suspicion of misconduct on her part, and when, consequently, no grounds existed for imputing collusion.[3] It is not, however, necessary, in the absence of other suspicious circumstances, to explain the cause of the husband and wife living apart at the time when the letters were written, though, of course, it is expedient that such explanation should, if possible, be given.[4]

Sec. 150. Illustration of the Rule Relating to Res Gestæ.

There are *other declarations and acts*, which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character and

[1] Trelawney *v.* Coleman, 1 B. & Ald. 90; Willis *v.* Bernard, 8 Bing. 376; Winter *v.* Wroot, 1 M. & Rob. 404; Gilchrist *v.* Bale, 8 Watts (Penn.), 355.

[2] Trelawney *v.* Coleman, 2 Stark. 193, *per* HOLROYD, J.; Houliston *v.* Smyth, 2 C. & P. 24, *per* BEST, C. J. This last case was an action for board and lodging supplied to a wife, while living separate from her husband, in consequence of his cruelty; and letters, purporting to be written by the wife, were tendered by the husband to rebut this charge, but were rejected, on the ground that no proof was given, beyond their date, of the time when they, were sent. See *ante*, § 110 where this exception to the general presumption respecting dates is accidentally omitted.

[3] Edwards *v.* Crock, 4 Esp. 39; Trelawney *v.* Coleman, 1 B. & Ald. 90; Wilton *v.* Webster, 7 C. & P. 198.

[4] Trelawney *v.* Coleman, 2 Stark. 191.

essential to be known, in order to a right understanding of its nature. These surrounding circumstances may always be shown to the jury along with the principal fact, provided they constitute parts of what are termed the *res gestæ*; and whether they do so or not must in each particular case be determined by the judge in the exercise of his sound discretion, according to the degree of relationship which they bear to that fact.[1] Thus, on the trial of Lord George Gordon

[1] *Per* PARK, J., in Rawson *v.* Haigh, 2 Bing. 104; Ridley *v.* Gyde, 9 Bing. 349, 352; Pool *v.* Bridges, 4 Pick. (Mass.) 379; Allen *v.* Duncan, 11 Pick. (Mass.) 309. If goods consigned by A. to B. are injured by the defendant whilst they are in the hands of the carrier, in an action for the wrong, brought either by A. or B., according to the circumstances, it would be competent to either of them, being plaintiff, to establish his right of property in the goods, by proof of such an agreement between them as either left the right of property and action in himself, or vested it in him by the delivery to the carrier. This would be, it is true, nothing more than an agreement between A. and B., to which the defendant was not privy; but it would be evidence against him, not as concluding any right of his without his assent, but as affecting the nature of the transaction itself, and showing to whom the injury was done. 1 Stark. Ev. 53; Murry *v.* Bethune, 1 Wend (N. Y.) 196. In the example put, it may be material to see the letters which had passed between A. and B., the direction of A. to his clerks or to the carrier, from which to infer the terms of the agreement and the identity and destination of the goods. In a late case the plaintiff sued out a foreign attachment against B., summoning the defendant as garnishee. The summons was served in November, 1828. On the 21st of the previous July the garnishee had thirty barrels of B.'s gin in his hands, which, by letter of that date, he was directed by B. to hold, with the proceeds of that sold, if any, subject to the order of G.; and, by letter of the August following, the garnishee had acknowledged that he held the gin and proceeds on account of G. These letters were at first excluded as not being evidence of the garnishee, under the notion that they were naked declarations; but on appeal, the Supreme Court held them clearly admissible, as evidence of the agreement by which the gin was transferred to G. Cox *v.* Gordon, 2 Dev. (N. C.) 512; Jones *v.* M'Neil, 2 Bail. (S. C.) 471. On the other hand, the holder of a check went into the bank, and when he came out, said he had demanded its payment. This declaration was held inadmissible to prove a demand, as being no part of the *res gestæ*. The demand was the fact to be proved. Brown *v.* Lusk, 4 Yerg. (Tenn.) 210.

It is difficult to lay down any precise general rule as to the cases in which declarations are admissible as part of the *res gestæ*, and the only way of useful instruction is to present the cases that have arisen under this head and judge of the application of the rules from these experimental tests.

for treason, the cry of the mob, who accompanied the prisoner on his enterprise, was received in evidence, as forming part of the *res gestæ*, and showing the character of the principal fact.[1] So, on an indictment for manslaughter, a statement, made by the deceased immediately after he was knocked down, as to how the accident happened, has been held admissible ;[2] and similar evidence was received by LORD HOLT, in an action brought by a husband and wife against a defendant for wounding the wife.[3] At the trial of a husband's libel for divorce on the ground of adultery, E. testified to seeing the libelee sitting in R.'s lap. R.'s wife testified that she requested her husband to hold the libelee in his lap, she being ill at the time, while the bed was making. R.'s wife testified that she left the room for a few minutes while her husband was holding the libelee, and when she returned he told her that E. had been in. R. testified to the occurrence substantially as stated by his wife, adding that E. came in while his wife was absent, and that he mentioned the fact to her when she came back. It was held that the statement of R. to his wife was competent as in the nature of a verbal act identifying the occasion as the same testified to by E.[4]

In an action against a surgeon, for negligently treating a fractured thigh bone, the defendant, in support of his allegation that he had placed the fractured limb upon a double-inclined plane, at an angle of forty-five degrees, or thereabouts, introduced a witness who testified to statements made in the presence of the plaintiff, by the defendant to the witness, at the time when the defendant brought the machine to the plaintiff's house, about the principle upon which the machine operated, and how it might be made a double-inclined plane of any angle, by means of a screw. The evidence was admitted, and on exceptions, the court held that, both as *res gestæ* and as a statement made in presence of the party, they could not say that it was erroneously admitted.[5]

[1] 21 How. St. Tr. 514, 529.

[2] R. *v.* Foster, 6 C. & P. 325.

[3] Thompson *v.* Trevanion, Skin. 402.

[4] Earle *v.* Earle, 11 Allen (Mass.), 1.

[5] Moody *v.* Sabin, 9 Cush. (Mass.) 505.

An officer, called as a witness for the commonwealth in a criminal case, was asked what he did in consequence of what was told him as to the commission of the offense, and answered that he started to look for the defendant; and the presiding judge admitted the answer in evidence. It was held, that the defendant had no ground of exception.[1]

The plaintiff sued the defendant for entering upon his land and digging a ditch there. The defendant justified on the ground that he only cleared out an ancient ditch as he had a right to do, to drain his own land above the plaintiff's. The plaintiff formerly owned the defendant's land, and sold the same to him; and C. formerly owned the plaintiff's land. It was held, that declarations of the plaintiff to the defendant, while owner of the defendant's land, and while negotiating the sale of it to the defendant, that he had a right to drain it over C.'s land, were admissible in evidence.[2] So, also, where a person enters upon land in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseizin,[3] or the like; or changes his actual residence or domicil, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself; or, in fine, does any other act, material to be understood; his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof, like any other material facts.[4] So, upon an inquiry as to the state of mind, sentiments, or dispositions of a person at any particular period, his contemporaneous declarations are admissible as parts of the *res gestæ*.[5] In a suit for enticing away a servant, the servant's statement

[1] Commonwealth *v.* Moulton, 4 Gray (Mass.), 39.

[2] Stetson *v.* Howland, 2 Allen (Mass.), 591.

[3] Co. Lit. 49 b, 245 b; Robinson *v.* Swett, 3 Me. 316; 3 Bl. Com. 174, 175.

[4] Bateman *v.* Bailey, 5 T. R. 512, and the observations of Mr. Evans upon it, in 2 Poth. Obl. App. No. xvi, § 11; Rawson *v.* Haigh, 2 Bing. 99; Vacher *v.* Cocks, M. & M. 353; Smith *v.* Cramer, 1 Bing. N. C. 585; Doe *v.* Arkwright, 5 C. & P. 575; Gorham *v.* Canton, 5 Me. 266; Thorndike *v.* City of Boston, 1 Met. (Mass.) 242.

[5] Barthelemy *v.* The People, &c., 2 Hill (N. Y.), 248, 257.

at the time of leaving his master will be received, as tending to show the motive of his departure ;[1] and where an action of trover was brought against the assignees of a bankrupt, and it appeared that the plaintiff, at the recommendation of the bankrupt, had sent some goods to a dyer, and had told him that the bankrupt would call and give directions about them, it was held that these directions should have been submitted to the jury on behalf of the assignees, as affording some evidence of a dealing with the goods, if not of the consent of the true owner to such dealing.[2]

In an action on the warranty of a horse, the question being whether it had fits, and it being proved that the plaintiff kept it in his livery stable, though its labor was needed, a witness testified that he was directed by the plaintiff not to let it because it had fits. It was held, that this testimony was admissible as part of the *res gestæ*.[3]

So where the purchaser of a horse returned it to the vendor with a message that "he would fix it all right," it was held, that the fact might be considered by the jury with other corroborative facts, in determining whether the purchaser had promised to pay for the use of the horse, if the jury were satisfied that the declarations were part of the act of redelivering the horse.[4]

Where property was sold and transferred for the purpose of paying debts due to the vendee and to other creditors, the declarations of the vendor and vendee, *at the time of the delivery of possession under the sale*, were held admissible as part of the *res gestæ*, as was the paper by which the vendor assumed to pay the debts, to rebut the allegation of fraud ; and also evidence that before the date of the sale the vendee had borrowed money for the purpose of reloaning it to the vendors.[5]

In a Missouri case, a husband dying, his widow and heirs made a division of his estate, including slaves, among them.

[1] Hadley *v.* Carter, 8 N. H. 40.

[2] Sharp *v.* Newsholme, 5 Bing. N. C. 713.

[3] Hersom *v.* Henderson, 23 N. H. 498.

[4] Knauss *v.* Shiffert, 58 Penn. St. 152.

[5] York County Bank *v.* Carter, 38 Penn. St. 446.

The widow afterwards dying, the administrators of the husband instituted suit against persons claiming under the widow, for the possession of certain slaves that had been assigned to the widow. It was held, that a bond executed by the heirs at the time, binding them to abide by the division, but which was not signed by the widow, though read over to her and not objected to, was admissible in evidence as part of the *res gestæ*, in behalf of the administrators, to show that the assignment was made to the widow as dower and not absolutely.[1]

Where the issue was, whether certain property had been sold to the defendant or a third person, it was held competent for the plaintiff to show that just before the sale he had been advised not to sell the property to such third person, and that he may prove this by the person who gave him the advice.[2] Where it is sought to prove a sale of goods, and a warranty thereof, it is proper to show all that was said by the parties during the pendency of the negotiations.[3] Where property is sold at a public sale, declarations of bystanders are held admissible as evidence in regard to it.[4] Where a person, at the time of loaning money, declares that it is trust money, or money that belongs to a ward, it is competent to be shown by him.[5] Where a stock of goods has been attached by a sheriff as the property of A. which are claimed by B. by virtue of a sale from A. to him, it is competent, in a suit to test the validity of B.'s title thereto, for B. to show, by one who was called in to take an account of the stock, a conversation at the time, between A. and B., that the account of the stock was to be taken for the purpose of turning it over to B. to satisfy a debt due to him from A. But in such a case it is not competent for the sheriff, or other person, who is claiming to hold the goods as A.'s property upon the attachment, to show the declarations and conduct of A. at the time when the attachment was

[1] Salmons *v.* Davis, 29 Mo. 176.

[2] Bronner *v.* Frauenthal, 37 N. Y. 166.

[3] Elliott *v.* Stoddard, 98 Mass. 115.

[4] Stewart *v.* Severance, 43 Mo. 322.

[5] Beasley *v.* Watson, 41 Ala. 234.

made, and not qualifying or explaining any material fact in the case *not* admissible.[1]

Nor is a card signed by the passengers on a train at the time of an accident, which was not signed until two days after the accident occurred, exonerating the officers from all blame, admissible as a part of the *res gestæ* in a suit against the company for damages.[2] But it is held that the acts and declarations of the donor and donee at the time of an alleged gift are competent to be shown to prove delivery, and a subsequent recognition by the donor of the donee's title may also be shown. Also that the statements of officials having the direction of public work, made during the time that the work was being prosecuted for a municipal corporation, to persons engaged upon it, are admissible to show the manner and circumstances under which the work was begun and prosecuted.[4] In an action against a railroad company for a breach of contract in the transportation of goods, the declarations of the engineer having charge of the train in which the goods were being transported, in reference to the cause of the delay, were held admissible as a part of the *res gestæ*.[5] In an action upon a bond, given to release a barge which had been attached to enforce a lien upon it for lumber sold to the builder by the plaintiff, it was held that the declarations of the builder to the plaintiff while transacting the business as to the person for whom he purchased it, and as to the amount required in building the barge, were admissible as part of the *res gestæ*.[6] So declarations made by the husband at the time of giving his wife money, as to the purpose for which he gave it, as well as his representations as to the person for whom he was acting when he received a bill of sale for his wife, are held admissible in an action in favor of the wife.[7]

[1] Pullman *v.* Newberry, 41 Ala. 168.

[2] Macon, &c., R. R. Co. *v.* Johnson, 38 Ga. 409.

[3] Bragg *v.* Massie's Adm'r, 38 Ala. 89.

[4] Maher *v.* Chicago, 38 Ill. 266.

[5] Sisson *v.* Cleveland, &c., R. R. Co., 14 Mich. 489.

[6] Happy *v.* Mosher, 47 Barb. (N. Y.) 501.

[7] Kells *v.* Campbell, 2 Abb. App. (N. Y.) 492.

In a suit by a creditor of the husband to set aside a deed of gift made by a third person to the wife, on the ground that the property was purchased with the husband's money, and the deed a fraud, evidence of conversations between the grantor and the person who negotiated the sale for the wife at the time of the sale, were held properly admissible.[1] In an action against one for false representations in the sale of property, it was held competent for him to show that similar representations were made to him by credible persons previous thereto, the evidence having a tendency to acquit him of bad faith in making the representations.[2] What is said by a person at the time of an accident caused by him, which has a tendency to prove that the accident was caused by his carelessness, is admissible to establish his negligence, as a part of the *res gestæ*.[3]

It is held that, where a person's personal habits may furnish a key to the act in question, they may be shown. Thus, when a note was claimed to have been given to the plaintiff on Sunday, it was held competent for him to show that he was the superintendent of a Sabbath school, which he invariably attended.[4] Declarations of the testator, at the time when a will is executed, are proper and competent evidence upon the question of capacity.[5] So it is held that the declarations of a principal to a note, as to the relations thereto of other parties whose names are thereon, made to the plaintiff at the time of obtaining his signature thereto, are admissible as a part of the *res gestæ*.[6] So, where a married woman has signed and acknowledged a deed of lands, jointly with her husband, in proceedings instituted by her to set aside the deed on the ground of fraud or duress, she may show the state of her mind and health at the time of her acknowledgment, and that her husband had preceded this by threats and menaces, which had put her in terror, and induced the act against her will.[7] So it is held that the

[1] Tevis *v.* Hicks, 41 Cal. 123.

[2] Beach *v.* Bemis, 107 Mass. 498.

[3] Courtney *v.* Baker, 34 N. Y. Sup. Ct. 529.

[4] Blackwell *v.* Hamilton, 47 Ala. 470.

[5] Bates *v.* Bettis, 27 Iowa, 110; 1 Am. Rep. 260.

[6] Whitehouse *v.* Hanson, 42 N. H. 9.

[7] Central Bank *v.* Copeland, 18 Md. 305.

declarations of a grantor, at the time of the execution of a deed for the benefit of his creditors, are properly admissible as a part of the *res gestæ* in a suit brought to set aside the conveyance on the ground of fraud.[1] So declarations of a grantor of real estate, made at the time when the conveyance is executed, are admissible to show the intention of the grantor in making the conveyance ;[2] but declarations or admissions made by a grantor *after* the conveyance is executed are not admissible.[3]

In an action against a physician or surgeon for malpractice, their statements made in the presence of the plaintiff during his treatment, or at the time when the plaintiff is discharged from further treatment, are always admissible as a part of the *res gestæ*.[4] Where, in an action for malpractice by a surgeon in treating a dislocation, as a fracture, it was shown that if his diagnosis was correct, a grating sound would have been heard upon manipulation of the limb, and it was held that declarations made by persons who were present at the time of the examination that they heard such a sound were admissible.[5] Where a person is sued for an assault and battery, when the evidence tends to show that the defendant was assaulted by the plaintiff and others upon the occasion when the injury sued for was inflicted, the declarations of any of the persons engaged in the assault upon him, as to their intention and purpose, are held admissible as a part of the transaction.[6] Where personal property is sold and left in the possession of the vendor, as agent of the vendee, in an action to test the validity of the sale it is held that the declarations of the vendor and vendee at the time of the sale are admissible. Where it becomes material to show whether a deed was delivered as an escrow, the acts and declarations of a party, preceding the execution of the deed by him, may be shown.[8] Declarations made by a husband, at the time

[1] Potter *v.* McDowell, 31 Mo. 62 ; Gillett *v.* Phelps, 12 Wis. 392.

[2] Kent *v.* Harcourt, 33 Barb. (N. Y.) 491 ; Badger *v.* Story, 16 N. H. 168 ; Gamble *v.* Johnson, 9 Md. 605.

[3] Myers *v.* Kinzie, 26 Ill. 36.

[4] Piles *v.* Hughes, 10 Iowa, 579.

[5] Hitchcock *v.* Burgett, 38 Mich. 501.

[6] People *v.* Roach, 17 Cal. 297.

[7] Clark *v.* Rush, 19 Cal. 393.

[8] Cheswell *v.* Eastham, 16 N. H. 296 ; Badger *v.* Story, 16 id. 168.

when money belonging to his wife comes into his possession, are, if evincive of his purpose and intention, admissible as evidence, when material, upon the question as to whether such money was received in trust for his wife, or whether he intended to reduce it to his own possession.[1] So the declarations of a party, at the time of paying money to a creditor, are admissible for the purpose of showing what application was to be made of it;[2] the declarations of the vendor of goods made at the time of the sale are a part of the *res gestæ* for the purpose of establishing the sale and its purpose;[3] and in fact everything that takes place between the parties to a verbal contract before its completion;[4] and it may be stated, generally, that whenever it becomes material to ascertain the nature of a particular act, and the intention of the person who did it, what he said and did at the time of doing it is always admissible as a part of the transaction itself;[5] as to ascertain the malady, or the true nature of its effects and symptoms, of a sick or injured person, whether made to a physician or others, but such declarations are entitled to more weight when made to a physician during his treatment of the patient.[6] So the declarations of the owner of lands claimed to have been dedicated to the public, both before and after their use by the public, to show his intention.[7] So instructions given by a principal to his agent in reference to the delivery of a message to, or the making of a demand of, another, when the message is delivered or the demand made.[8] What is said by the parties to a sale in reference to it during the pendency of negotiations.[9] What is said by a person when paying money to another, as to the application of it, or as to whose money he is paying.[10] To show whether goods

[1] Johnson *v.* Johnson's Ex'rs, 31 Penn. St. 450; Gicker's Adm'r *v.* Martin, 50 Penn. St. 138; Moyer's Appeal, No. 44, Weekly Notes of Cases (Penn.), 527.

[2] Bank of Woodstock *v.* Clark, 25 Vt. 308.

[3] Dale *v.* Gower, 24 Me. 563.

[4] Pierson *v.* Hoag, 47 Barb. (N. Y.) 243.

[5] Curtis *v.* Moore, 20 Md. 93.

[6] Stone *v.* Watson, 1 Ala. 236; Perkins *v.* Concord R. R. Co., 44 N. H. 223.

[7] Buchanan *v.* Curtiss, 25 Wis. 991; 3 Am. Rep. 23.

[8] Featherman *v.* Miller, 45 Penn. St. 96.

[9] Atherton *v.* Tilton, 44 N. H. 452.

[10] Carter *v.* Beals, 44 N. H. 408.

were sold by one as his own, or as the agent of another, his declarations at the time of the sale are admissible.[1] To show what title one claims to property in his possession, his declarations relative thereto while he has the property in his possession are admissible.[2] So where one sues for injuries done to his property by another, while the property was in the possession of a servant, the declarations of the servant at the time of the injury as to the cause thereof are admissible. So it has been held that the exclamations of passengers on a railway train at the time of the happening of an accident; the declarations of bystanders at a public sale;[5] the acts and sayings of a constable at the time of making a levy;[6] of a public surveyor when running a line to establish the character or purpose of the survey;[7] what is said by a claimant to the sheriff at the time of a levy;[8] what is said by a person while engaged in carrying away property claimed by another;[9] what is said by the plaintiff in a writ of attachment, as to his reasons for having it issued, made at the time of its issue.[10] Negotiations between parties are admissible to show to whom credit was given, and to explain the transaction;[11] instructions given by one of the parties to an assistant;[12] what is said by a person when money is paid to him, to show whether it was received in full or not, as well as to show upon what debt it was to be applied;[13] statements made by a person at the time when a demand is made upon him for property, or for any purpose;[14] the declarations of a servant at the time of leaving his master;[15] the declarations of a person engaged upon work, to show who he was working for and the nature of the contract;[16] the declarations of a per-

[1] Milne *v.* Leisler, 7 H. & N. 786.
[2] Patterson *v.* Flanagan, 1 Ala. (S. C.) 427.
[3] Toledo R. R. Co. *v.* Goddard, 25 Ind. 185.
[4] Galena R. R. Co. *v.* Fay, 16 Ill. 558.
[5] Stewart *v.* Severance, 43 Mo. 322.
[6] Arnold *v.* Gorr, 1 Rawle (Penn.), 223; Dobb *v.* Justice, 17 Ga. 624; Grandey *v.* McPherson, 7 Jones (N. C.), 347.
[7] George *v.* Thomas, 16 Tex. 74.
[8] Morgan *v.* Simms, 26 Ga. 283.
[9] Drumwright *v.* State, 29 id. 430.
[10] Wood *v.* Banker, 37 Ala. 60.
[11] Eastman *v.* Bennett, 6 Wis. 232.
[12] Wilson *v.* Smith, 28 Ill. 495.
[13] Dillard *v.* Scruggs, 36 Ala. 670.
[14] Lamphy *v.* Scott, 24 Miss. 528.
[15] Hadley *v.* Carter, 8 N. H. 40.
[16] Printop *v.* Mitchell, 17 Ga. 558.

son on leaving home as to where he was going and the nature of his business;[1] declarations of the principal to a note, as to the relation of those whose names are already upon it, made to one whose signature he obtains thereto;[2] declarations of one in the possession of property, made at the time when the property was delivered to him, to show the nature and purpose of his possession,[3] have been held admissible as a part of the *res gestæ;* as the declarations of the vendor before the sale as to the character or quality of the goods;[4] or of one in the possession of land, as to the extent of his claim, and the character of his occupancy;[5] or his intention in doing a certain act, as that, by clearing land and burning charcoal thereon, he intended to settle and improve the lands.[6] So it has been held that the declarations of a person having personal property in his possession, made before any claim is made to the property by another, may be given in evidence in an action between him and a person claiming the property, but that the weight to be given to such evidence is for the jury.[7] Thus it will be seen that, whenever the acts or declarations of a party, made at the time of a transaction, and so intimately connected therewith as to form a part of it, which tend to explain the transaction, or to aid in arriving at the real nature, character, and purpose of the transaction, are admissible in evidence as well for as against the party making them; and such evidence is admissible not only in actions between the parties themselves, but also in actions for or against their personal representatives, or those who are privy in interest with the parties. The justice of the rule, permitting all the acts and declarations of a party immediately connected with it, and material thereto, to be given in evidence to show the real intention, object and purpose of parties to a contract, when any reasonable doubt exists from the language of the contract itself, as well as the acts and dec-

[1] State *v.* Howard, 32 Vt. 380; Autauqua Co. *v.* Davis, 32 Ala. 713.

[2] Whitehouse *v.* Hanson, 42 N. H. 9.

[3] State *v.* Schneider, 35 Mo. 533; Johnson *v.* Boyles, 26 Ala. 576.

[4] Land *v.* Lee, 2 Rich. (S. C.) 168.

[5] Sailor *v.* Hertzogg, 2 Penn. St. 182.

[6] Jones *v.* Brownfield, id. 55.

[7] Gerry *v.* Terrill, 9 Ala. 206; Horton *v.* Smith, 8 id. 73; Trotter *v.* Watson, 6 Humph. (Tenn.) 509.

larations of parties to *any* transaction, to show the real nature and character of the transaction or act, is unquestionable. The real intention of a person in a transaction, which is not reduced to writing, can be gathered in no other way. Men act from secret motives, and their *declared* intention is very often quite at variance with the *real* motive which actuates them. Therefore, the only real key thereto is their acts, and any acts calculated to throw light upon that point, and intimately connected with it, are always admissible. Thus, it has been held that, when fraud in the purchase or sale of property is in issue. it is competent to show other similar frauds committed by the *same* parties, at or near the same time, as tending to establish the *animus* of the parties in the transaction in question, and to show their fraudulent intent —as, in a proceeding for the forfeiture of a distillery for fraudulent distillation, it has been held competent to show the fact that, by the decree of another court, liquors from the same distillery had been forfeited.[1] So, it has been held competent to show in a proceeding for a forfeiture under the internal revenue law, that the defendants have been guilty of other similar frauds, in order to establish their fraudulent intent.[2] So, in an action against a commission merchant for fraudulently selling the goods of a customer to an insolvent purchaser, evidence of similar fraudulent acts at about the same time have been held competent upon the question of intent,[3] and in proceedings for forfeiture, under the customs law, by means of false invoices, or undervaluation of goods, it is held that evidence of previous similar transactions, both before and after the transaction in question, may be shown.[4]

[1] United States *v.* One Distillery, 2 Bond (U. S.), 399; Butler *v.* Watkins, 13 Wall. (U. S.) 456.

[2] United States *v.* Merriam, 3 Chicago Legal News, 114; United States *v.* Thirty-six Barrels of High Wines, 7 Blatch. (U. S.) 469; United States *v.* Four Cases Merinoes, 2 Paine (U. S.), 200.

[3] Garth *v.* Bullard, 23 How. (U. S.) 172.

[4] Taylor *v.* U. S., 3 How. (U. S.) 197; Wood *v.* N. Y., 16 Pet. (U. S.) 342; Buckley *v.* U. S., 4 How. (U. S.) 251; Alfonso *v.* U. S., 2 Story (U. S.), 421. In Rex *v.* Davis, 6 C. & P. 177, it was held that, in a prosecution for receiving stolen goods, it was competent to show that the respondents, who were pawnbrokers, had received other stolen goods from the *same person*, with a view to establish the *scienter*. But, while the rule as applied to this case,

Thus it will be seen that, while, in order to show a person's intent in a particular matter, transactions between the *same parties* of a *similar character* may be shown, similar transactions between *other* persons, to which one of the parties was a party, are *never* admissible.[1]

Sec. 151. How far Acts and Sayings of Parties to a Written Contract at the Time of Making it, are Admissible.

The *general* rule excludes all parol evidence in reference to written contracts, which tends to alter, vary or control their terms; and this extends even to the exclusion of what was said or done by the parties thereto before, at the time of, or just after, the making of the contract. The entire agreement of the parties — in the absence of fraud or mistake — is regarded as being merged in the writing itself; and when there is no *latent* ambiguity therein, the writing must speak for itself, and be construed without resort to extrinsic evidence. But, when the meaning and intent of the parties to the instrument cannot be reasonably gathered from its language, as where words are used, the ordinary meaning of which, applied to the contract, would be senseless; or where the instrument is susceptible of a double

and generally as restricted in that case to transactions between the *same parties*, may not be obnoxious to criticism, yet the case itself, and the consideration given the question by GURNEY, J., on the trial, does not entitle it to great weight as an authority. The same rule, however, was adopted in Rex *v.* Dunn & Smith, 1 M. C. C. 147. In Coleman *v.* The People, 55 N. Y. 81, it was held that evidence that the respondent had received other stolen property from *other* persons was not admissible to establish the *scienter;* and in People *v.* Corbin, 56 N. Y. 363; 15 Am. Rep. 427, it was held that evidence of *other forgeries* by the respondent was not admissible in a prosecution against him for forging the name of *another* person. It was well said by RAPALLO, J., in the case referred to, that "the fact that the prisoner made an unauthorized use of the name of one person, if established, shows that he was morally capable of committing the same offense against another, *but does not legitimately tend to show that he did so.*"

[1] Jones *v.* Knowles, *ante.* In State *v.* Howard, 32 Vt. 380, the respondent was arrested for procuring an abortion, and the fact of the death having been proved to have occurred at his house, and other circumstances tending to establish the crime, it was held that the declarations of the deceased at the time she left home, as to her purpose in going to the respondent's house, were admissible as a part of the *res gestæ.*

construction essentially different from each other, as well as in numerous other instances, parol evidence of what was said or done by the parties at the time of the making of the contract, the existence of a local custom or a usage of a trade in reference to which the contract was made; or by which certain ordinary words are given a special and peculiar meaning; or a condition of things in the locality where the contract was made, in reference to which the contract was made, may be given in evidence really as a part of the *res gestæ*, not to alter or vary the contract itself, but to explain it, and ascertain the real intention and purpose of the parties thereto. Thus, where the meaning and application of a written contract cannot be ascertained from the *instrument itself*, parol evidence may be given to explain its true intent and meaning;[1] and this, whether the ambiguity arises from the contract itself, or the mode of executing it;[2] and facts existing at the time of making the contract, to which the words employed in it relate, may be proved as a solution of the real intent, purpose and meaning of the parties;[3] as that a contract for the payment of money was made with reference to Confederate money;[4] or a custom, in reference to which the contract was made and by which a peculiar meaning is given to certain terms or phrases used therein;[5] but such custom is never admissible to vary a well-established rule of law;[6] or when opposed to the clear provisions of the contract.[7] The circumstances attending the

[1] De Wolf *v.* Crandall, 1 Sweeney (N. Y.), 556; Suffern *v.* Butler, 21 N. J. 410; Sweet *v.* Shumway, 102 Mass. 365; Iron City Commercial College *v.* Kerr, 3 Brewst. (Penn.) 196; Howlett *v.* Howlett, 56 Barb. (N. Y.) 467; Arthur *v.* Roberts, 60 id. 580; Robinson *v.* United States, 13 Wall. (U. S.) 363; Harris *v.* Rathbun, 2 Abb. App. (N. Y.) 426.

[2] Haile *v.* Pierce, 32 Md. 327; Richmond R. R. Co. *v.* Snead, 19 Gratt. (Va.) 354.

[3] Richards *v.* Schlagelmick, 65 N. C. 150; Donley *v.* Tindall, 32 Tex. 43.

[4] Thornington *v.* Smith, 8 Wall. (U. S.) 12; Donley *v.* Tindall, *ante*.

[5] Carey *v.* Bright, 58 Penn. St. 70; Hurlbert *v.* Carver, 37 N. Y. 62; Harb *v.* Hammett, 18 Vt. 127; Collyer *v.* Collins, 17 Abb. Pr. (N. Y.) 467; Williams *v.* Wood, 16 Md. 220; Drake *v.* Goree, 22 Ala. 409; Fitch *v.* Carpenter, 43 Barb. (N. Y.) 40; Willmering *v.* McGaughey, 30 Iowa, 205; Wells *v.* Bailey, 49 N. Y. 464.

[6] Boon *v.* Belfast, 40 Ala. 184; Shaw *v.* Spencer, 100 Mass. 382.

[7] Lombardo *v.* Case, 45 Barb. (N. Y.) 45.

transaction, and what was said and done by the parties while engaged in the act of execution, may be resorted to, not to vary, but to explain and apply the contract,[1] and show the real intention of the parties;[2] but a party cannot, even when there is an ambiguity, be allowed, in the absence of fraud, to swear to what his *understanding* of the matter was, unless the other party understood the matter the *same way*.[3]

So it is always competent to show that the contract was made in furtherance of an illegal object, or is void for the reason that it never had any legal existence;[4] or where it is silent as to the time or mode of payment, parol evidence may be given to establish the understanding or agreement of the parties in that respect; and the same is true when any essential feature or part of the contract has obviously been omitted;[5] as, where a person has sold the good will of a business, in what place his business was located;[6] or to show the *actual* or an additional consideration of a contract or deed, when the terms of the bargain are not specifically stated;[7] or to identify property described in it, whether real or personal;[8] or to show that a sale mentioned in a written agreement was made by sample, and whether or not the articles tendered correspond therewith;[9] or the purpose for

[1] Foster *v.* McGraw, 64 Penn. St. 464; Field *v.* Munson, 47 N. Y. 221; Ins. Co. *v.* Thorp, 22 Mich. 146; Goodrich *v.* Stevens, 5 Lans. (N. Y.) 230; Bambridge *v.* Wade, 20 L. J. (Q. B.) 7; Grant *v.* Lathrop, 23 N. H. 67; Knights *v.* N. E. Worsted Co., 2 Cush. (Mass.) 271; Spencer *v.* Babcock, 22 Barb. (N. Y.) 326; Conner *v.* Carpenter, 28 Vt. 237; Emery *v.* Webster, 42 Me. 204; Ratcliff *v.* Allison, 3 Rand. (Va.) 537; Carmony *v.* Hooper, 5 Penn. St. 305; Black *v.* Columbian Ins. Co., 42 N. Y. 393; McGuire *v.* Stevens, 42 Miss. 724; Acker *v.* Bender, 33 Ala. 230; Sigerson *v.* Cushing, 14 Wis 527; Cross *v.* Pearson, 17 Ind. 612; Halstead *v.* Meeker, 15 N. J. 136; Haideman *v.* Chambers, 19 Texas, 1.

[2] Venzan *v.* McGregor, 23 Cal. 339; Ohio, &c., R. R. Co. *v.* Middleton, 20 Ill. 629; Hinnemann *v.* Rosenback, 39 N. Y. 98; Farmers' Bank *v.* Winfield, 24 Wend. (N. Y.) 419; Lowrey *v.* Adams, 22 Vt. 160; Donnell *v.* Simonton, 13 Minn. 301.

[3] Dalano *v.* Gorham, 48 N. H. 203.

[4] Leppoc *v.* Nat'l Union Bank, 32 Md. 136; Martin *v.* Clarke, 8 R. I. 389.

[5] Paul *v.* Owings, 32 Md. 402; Donley *v.* Tindall, 32 Tex. 43.

[6] Warfield *v.* Booth, 33 Md. 63.

[7] Pierce *v.* Brew, 43 Vt. 292; Nedvidek *v.* Meyer, 46 Mo. 600; Landeman *v.* Ingraham, 49 id. 212; Perry *v.* Smith, 34 Tex. 277; Booth *v.* Hines, 54 Ill. 363.

[8] Hutton *v.* Arnett, 51 Ill. 198; Bancroft *v.* Grover, 23 Wis. 463.

[9] Pike *v.* Fay, 101 Mass. 134;

which a note was given, when not inconsistent with its terms ;[1] or for whose benefit a contract was made ;[2] or that it was executed upon condition that some other person sould sign it ;[3] or when fraud is claimed, or any breach of warranty in an action upon an insurance policy, upon the ground that the building was used for purposes more hazardous than those in the class in which it was rated, proof is admissible to show that the insurers knew the structure and the uses to which it was devoted ;[4] or when only a part of the agreement has been reduced to writing and it rests partly in parol ;[5] so any distinct valid parol contract between the parties, made at the same time and not reduced to writing, which is not in conflict with the terms of the written contract, and which operated as an inducement to either of the parties to enter into the original agreement ;[6] but this must not be understood as authorizing the proof of any parol agreement so made, to in any wise vary, enlarge or control the terms or provisions of the written contract.[7]

The application, force and extent of this exception to the rule is well illustrated by a case decided in the Supreme Court of Pennsylvania[8] under the following state of facts :

Stoops *v.* Smith, 100 id. 63 ; Sweet *v.* Shumway, 102 id. 365.

[1] Collins *v.* Gilson, 29 Iowa, 61 ; Kimball *v.* Myers, 21 Mich. 276 ; Hutchins *v.* Hubbard, 34 N. Y. 24.

[2] Lancey *v.* Phenix, &c., Ins. Co., 56 Me. 562 ; Washington Ins. Co. *v.* St. Mary's Seminary, 52 Mo. 480.

[3] Robertson *v.* Evans, 3 S. C. 330 ; Butler *v.* Smith, 35 Miss. 457.

[4] Mayor, &c., of N. Y. *v.* Exchange Ins. Co., 3 Abb. App. (N.Y.) 261.

[5] Webster *v.* Hodgkins, 25 N. H. 128 ; Barker *v.* Bradley, 42 N. Y. 316 ; Winn *v.* Chamberlain, 32 Vt. 318 ; Crane *v.* Elizabeth, &c., Assoc., 29 N. J. 302.

[6] Bonney *v.* Merrill, 57 Me. 368.

[7] Vandercar *v.* Thompson, 19 Mich. 82 ; Proctor *v.* Gilson, 49 N. H. 62 ; Buzzell *v.* Willard, 44 Vt. 44 ; Basshor *v.* Forbes, 36 Md. 155 ; Weaver *v.* Fulsher, 27 Ark. 510 ; Smith *v.* Dallas, 35 Ind. 255.

[8] Shugart *v.* Moore, 1 Weekly Notes of Cases, 598, 599. SHARSWOOD, J., said: "The cases of Weaver *v.* Wood, 9 Penn. St. 220, and Powelton Coal Co. *v.* McShain, 74 Penn. St. 238, are full to the point that the evidence should have been admitted. These cases settle, beyond all question, that when a promise is made by one party, in consideration of the execution of a written instrument by the other, it may be shown by parol evidence." The same doctrine was applied in the case of Lindley *v.* Lacey, 17 C. B. (N. S.) 578. In that case it was held that where, in negotiating the sale of the good will and fixtures of a business, the purchaser promised

The plaintiff went into possession of defendant's farm under a written lease, by the terms of which he was to cultivate

that, in consideration of the vendor's signing the agreement, he would settle a suit of a third party pending against the vendor, that parol evidence of such agreement was admissible, *even though the written agreement authorized the purchaser to settle the suit out of the purchase-money.* In Baker *v.* Mich. Cent. R. R. Co., 42 Ill. 73, the plaintiff shipped eighty tierces of hams over the defendants' road, in reference to the shipment and transportation of which he made an oral agreement with the defendants, through their agent, that the freight should not be subject to the restrictions upon the carriers' liability applied to less perishable goods. The bill of lading contained this restriction, but the court held that the agreement between the parties might be shown by parol evidence in rebuttal of the bill of lading in that respect. In Silliman *v.* Tuttle, 45 Barb. (N. Y.) 171, the plaintiffs bought of the defendants a canal boat. The price was agreed upon, and a bill of sale executed and delivered. The boat was then on a trip transporting merchandise, and it was agreed, by parol evidence, between the parties, at the time of the sale, that the plaintiffs should have the avails of the trip, upon payment of the expenses thereof. The bill of sale was silent upon this matter, and the title and right of possession passed on delivery of the bill. It was held by the court that this was an independent contract, relating to the earnings of the boat, and not to the boat itself, and having no necessary connection with its sale, and that parol evidence was admissible to establish it, and that its establishment did not, in any wise, interfere with, alter, vary or control the bill of sale.

So evidence is admissible when it only tends to establish a contract supplemental to the written contract. Thus, in Malpas *v.* London, &c., R. R. Co., L. R., 1 C. P. 336, the plaintiff made arrangements orally with the defendants to convey cattle for him to E. on their railway, and thence to K. on a connecting line, and at the same time, without noticing its contents, signed a consignment note by which the cattle were directed to be shipped to E. It was held that evidence was admissible to prove the parol agreement to transport the cattle from E. to K., as such agreement did not conflict with the consignment note, but was merely *supplemental* thereto. That collateral parol agreements relating to the subject-matter of the contract, but entirely independent of the contract itself, and not intended to qualify or control it, may be given in evidence, and may be made the ground of an action, or, in a proper case, set up as a defense to the instrument itself, is established by numerous authorities. Buzzell *v.* Willard, 44 Vt. 44; Morrill *v.* Waterson, 7 Kan. 199; Wesbrook *v.* Jeffers, 33 Tex. 86. But the contract must be an independent one, and such as could properly be made by parol, and as is not repugnant to the provisions of the written agreement; that is to say, it must not be such a contract as in any wise qualifies, limits or controls the written instrument itself, or its effect, application or construction. Thus it has been held incompetent to introduce evidence of a parol agreement, that the deed of a certain piece of land

the farm upon shares. There was no barn upon the premises suitable to store the crops in, and there was no provision in the lease in reference to the building of a new one; but the plaintiff offered to prove upon the trial, that before the first of April, 1869, the defendant proposed that if he (the plaintiff) would lease and move on to his (the defendant's) farm for a year, as a *cropper*, he (the defendant) would build a barn thereon by harvest time; that when the defendant brought the agreement to him to sign, he at first refused to sign it, because it did not mention that the defendant was to build the barn; that the defendant then said that that was not necessary, as he was a man of his word and would do as he had agreed, whereupon the plaintiff signed the agreement and entered into the possession of the farm; but the defendant neglected and refused to build the barn. Upon the trial of the case in the lower court the judge refused to admit the evidence of the foregoing facts, but the Supreme Court held that the evidence was admissible.

On a question whether a deputy sheriff acted negligently or unfaithfully in not making an arrest of one S., evidence was received that he inquired at S.'s place of residence, called at his shop, inquired of a man and boy, who told him S. was at his house, where he went and inquired for him of a woman whom he learned was S.'s wife, mentioning to her his business. She told him that her husband was then at work at the shop. The evidence of these answers was objected to as hearsay, and excluded; but a new trial was granted. The court said it was a material point whether the officer made due search and inquiry. It was his duty to inquire at all proper places, and search wherever it was probable S. would be found. To show this, it was necessary he should state the inquiries and the answers made, and that he had made search accordingly. Such answers are part of the transaction. They are facts, and do not

should pass the manure then on the premises, because such an agreement would qualify or extend the provisions of the instrument, and add to its effect, and control its legal construction; because the question as to whether the manure passed by the deed is purely one of law, depending upon a variety of questions. Proctor *v.* Gibson, 49 N. H. 62.

stand on the footing of hearsay evidence.[1] The defendant, as deputy sheriff, seized a lot of wool and other property, under an execution against S., as his property. The plaintiff had delivered wool to S. to be manufactured; and before the seizure, on inquiring of S. at his factory as to his progress, S. showed the plaintiff the wool, yarn and bocking, which he said were the plaintiff's, who then examined them. S. afterwards absconded, and the goods were seized. These declarations of S. were offered in evidence, and held admissible, the court saying: "As a mere declaration, this is not evidence; for though S. is out of the country, his sayings should be rejected as hearsay. It is a difficult case of the *res gestæ*. The property was in possession of S., and difficult to be distinguished from other property of the same kind also in his possession. If the saying had been without the parties being engaged in any act, it would have been mere hearsay. *But here was an act.* It was like labeling the goods with the owner's name. Showing the property to the plaintiff as his wool, on his going and inquiring, in different stages of process, was an act or transaction, and is like an actual separation from the common mass.[2] So, although, on the trial of an indictment for manslaughter, malice cannot be shown on the part of the prosecution, yet declarations made by the prisoner, at the commencement of, and during the fatal affray, as well as immediately before and after it, must be received as constituting a part of the *res gestæ;* and this although they may incidentally tend to show malice.[3] In this case, the parties being shown together quarreling immediately *before* the fatal blow, a witness was allowed to state that, in the course of the quarrel, the prisoner threatened that he would kill the deceased before he went asleep. Indeed, malice may be quite material; for should plain murder be made out, the court might, in its discretion, discharge the jury, and order a higher indictment to be preferred. In an action for a libel, what a third person told the defendant as to its truth before the defendant

[1] Phelps *v.* Foot, 1 Conn. 387; Ponsonby *v.* Debaillon *et al.*, 6 Mart. (La.) Rep. 238.

[2] Pool *v.* Bridges, 4 Pick. (Mass.) 378.

[3] State *v.* Powell, 7 N. J. L. 244.

published the libel, was offered in proof to mitigate damages, and was held receivable.[1] In a settlement cause, on a question whether C., the grandfather, had made a gift of a slave to his granddaughter, it was proved by the defendants that he requested her to be brought up so as to be useful to his granddaughter when married, to whom he intended to give her, and that F., who married the granddaughter, came and took the slave, saying that she had been given to his wife by her grandfather. And this evidence was held admissible as part of the *res gestæ*. The court said the change of possession was established. The declarations of the parties went to show the intent with which the change was made. On *scire facias*, to enforce a recognizance against a house on which, with other real estate, it had been charged by K., the cognizor, the defendant, claiming under K., sought to raise an inference of payment from the fact of the *cestui que trust* of the plaintiff having released some of the land charged, and especially a tract sold by K. to Fisher. In reply to this, the plaintiff offered K.'s letter in evidence, requesting such release, on the ground that there was other property out of which satisfaction could be obtained. This was objected to as *res inter alios acta*, but it was held admissible, as completely repelling the inference of payment, so far as it was derivable from the circumstances of the release.[2] In an action against a surety on a bond for money, he insisted that he was discharged by the plaintiff's laches. The plaintiff, to show that the surety was indemnified, offered to prove that his principal had delivered a note to a witness, *telling him it was for his surety*, and that it was to secure him ; and that the note was delivered to the surety, who collected it. The declarations of the principal were holden admissible in evidence as part of the *res gestæ*.[3] Upon a trial for larceny, it appeared that the prosecutor, on his return from search, declared himself satisfied of the prisoner's innocence, having found his watch in his waistcoat pocket; and directed the

[1] Coleman *v.* Southwick, 9 John. (N. Y.) 45 ; Kennedy *v.* Gregory, 1 Binn. (Penn.) 85; Morrison *v.* Duane, 1 id. 90.

[2] Reigart *v.* Ellmaker, 10 S. & R. 27.

[3] Deardorf *v.* Hildebrand, 2 Rawle (Penn.), 226.

driver to turn about. The prosecutor being absent, his declarations were received for the prisoner as a part of the *res gestæ*.[1] In an action for breach of a marriage promise, the defendant may show by a third person, in order to mitigate damages, that his father declared to him his dislike of the match, on account of the plaintiff's bad character. It appeared that the father was an incompetent witness, having employed the defendant's attorney.[2] In a writ of entry against a grantee of S., which grantee had notice of a prior deed from S., under which the defendant claimed, it was alleged that S. had fraudulently obtained and suppressed the first deed; and to show this, it was in proof that he obtained access to the desk of the first grantee under pretense of searching for other papers. It was held that his declarations, while at the desk, going to identify the deed as one of the papers which he took away, and to show its contents, were admissible in evidence as part of the *res gestæ* against the tenant.[3]

There are certain facts which can only be proved by the acts or declarations of a party, as that he could write, or read, or knew the multiplication table, etc.[4]

Sec. 152. Declarations as to Possession of Lands, Etc.

It is not necessary, in order to warrant such evidence, that the act done with which the declaration is connected, should be a single effort or a positive transaction in the common sense of the term. *It may be continuous for a series of years, and of a passive or negative character.* Thus possession of real estate for a long time may be qualified and explained by the declaration of the possessor, the apparent owner in fee being thus cut down to the mere *squatter*, or the apparent *squatter* elevated to the owner in fee, as is done every day in our courts.[5] So also the apparent general owner of personal property may be turned into a bailee or trespasser, and *e converso*. And see the subsequent notes. Long forbearance

[1] Kelly's Case, 3 C. H. Rec. 153.

[2] Irving *v.* Greenwood, 1 C. & P. 350.

[3] Davis *v.* Spooner, 3 Pick. (Mass.) 284.

[4] Darby *v.* Rice, 2 N. & McCord (S. C.), 596.

[5] Human *v.* Pettett, 5 B. & Ald. 223.

may, in like manner, be shown to signify absolute title, or temporary tenancy in another, and an apparent legal resident or citizen reduced to the temporary sojourner. And it makes no difference whether the declarant is alive, and a competent attainable witness, or is dead. The declaration is identical with the act, and may be proved in the same manner as might the hand and seal of the declarant, either by himself, or any person who saw him sign and seal.

In case of declarations brought forward to qualify either temporary or continuous acts of possession, we are first to be satisfied, *prima facie*, at least, that there is a possession. This may appear by actual occupancy, inclosures, partial occupancy under a deed or contract, which carries out a constructive possession commensurate with its terms of local description, acts of ownership, etc., and an act, which would be deemed a very slight indication of possession and consequent ownership, especially in the unsettled parts of this country, will let in proof of declarations. Thus, the lessor of the plaintiff, to show seizin of a wood lot in his ancestor, proposed to prove that one Brown cut timber there by the ancestor's permission. Having proved, simply, that Brown was seen in the wood cutting timber, he then proposed to ask what Brown had said as to who was the owner of the wood. The defendant objected to this evidence, but it was admitted, PARKE, J., saying: "He exercised an act of ownership, and he is, therefore, *prima facie* owner. And what he says as to any one else being the owner, is a declaration to cut down his own title." And upon it being objected that he was a mere workman, PARKE, J., said: "I do not know that he was only a workman, except from what he may have said." And upon the inquiry being made whether he would only hear what he said at the time, PARKE, J., said: "Yes, what he said at any time." The latter must have been on the ground, that the act of cutting wood being *prima facie* evidence of a continuing ownership and possession, both before and after the act, would thus constructively extend each way, and connect itself as a possession with any declaration made before or after.[1]

[1] Stansbury *v.* Arkwright, 5 C. & P. 575; Gage *v.* Smith, 27 Conn. 70.

This case goes to the utmost latitude of constructive possession, as the foundation for letting in proof of the occupant's declarations. And in allowing the tenant to connect himself in this way with the party as owner, by setting up a contract, it goes farther than some of the American courts have been willing to go. Thus, in a case where the defendants, as heirs of one Price, claimed to extend their ancestor's adverse possession over the lines of his grant into lands granted to one Greenup previous to 1804, which lands Greenup conveyed to the lessor of the plaintiff in 1815, to make out the defense, it was proved, among other things, that in February or March, 1804, Price demised the land contained in his grant to one Haydon, who entered, claiming under one Price; and a witness was allowed to state, that about the time Haydon entered, he told the witness that he was to clear ten acres of land for rent, according to the contract with Price; and some time afterwards, Haydon showed the witness, demarked by blazes on the trees, the ten acres which he stated he was to clear, which ran across the division line between the parties, as pointed out by their grants, and comprehended land lying within Greenup's boundaries. Haydon cleared a turnip patch lying within the ten acres in the season of 1804, and got firewood there. A part of the turnip patch extended across the line, and in the winter following, the patch was enlarged by a farther clearing, making in the whole two acres cleared within the plaintiff's boundaries, which had been fenced and cultivated by Price and his heirs ever since. The demarkation of trees extended still farther within the plaintiff's boundaries. The testimony as to Haydon's declarations having been objected to, but admitted, now came, on exception taken, before the Court of Appeals on a writ of error. UNDERWOOD, J., delivering the opinion, remarked that "to legitimate the statements made by Haydon to the witness, and to rid them of the character of mere hearsay, they must be considered as part of the *res gestæ*; and if they cannot be so considered, they ought to have been rejected. Conversations or declarations, made by the actor or party concerned, at the time an act is done, and which explain the *quo animo* and design of the performance,

may, whenever the nature of the act is called in question, be given in evidence as part of the *res gestæ*. Without tolerating this explanation of the acts of men, by receiving their accompanying declarations, we should be often misled as to their true nature and character, and consequently liable to fall into errors in respect to them. The rule requiring *res gestæ* declarations to be received as evidence, is a necessary and very useful one; but, in the present case, we think it will not sanction the reception of the testimony objected to. Haydon, as an occupant or tenant of the land, might, during his actual occupancy, make declarations which ought to be received whenever offered in evidence, to show the nature and character of his tenancy, whether as claimant in his own right or right of another, whether as tenant of the freehold or for years, whether adversely to a particular claim or not, etc. In cases like these, the occupancy or tenancy is the act; the declarations to explain its nature and extent, made by the tenant while in possession, are the *res gestæ*. Haydon's declarations, while occupying the land, were very proper to show that he held under Price, and that his possession was as tenant under Price; but Haydon's statements were not confined to this. They have been unwarrantably extended. His mere declaration to the witness was received as evidence of what the contract was between him and Price. By showing the blazes on the trees to the witness, and by declaring that they included the ten acres he, Haydon, was to clear, his statement without oath established a contract between him and Price in relation to these identical ten acres; and thereby Price, by his tenant, Haydon, is made the adverse possessor, by construction, of another's land, to the extent of the blazed demarkation. The contract between Haydon and Price is one thing, the occupancy of the land by Haydon is another; and the declarations of Haydon in relation to the nature of his possession, as *res gestæ*, is still another. It was as improper to admit proof of the first under the idea of *res gestæ*, by receiving as evidence what Haydon had been heard to say, as it would have been to have received the hearsay of Haydon to prove that Greenup, in 1804, had actually conveyed

the land in controversy to Price." He then goes on to show that, however plain a tenant's possession may be, it does not follow that he can, by his declarations, connect himself with another in a distinct and independent contract, as, in this case, the contract for clearing the land; and that the effect must be merely to qualify the possession in respect to himself. He would not allow that Price could come in and adopt the adverse possession for himself which Haydon had assumed for him, as it seems to have been intimated Stansbury might have done, in the above English case.[1] Under this general doctrine it has been held that the declarations made by the warrantor in a deed, while in possession, going to show in what character and with what intent he entered and continued his possession, are admissible in favor of the title derived from him.[2] And on a question of settlement, one party having given in evidence long adverse possession of land by the father of the paupers, to make out that he had a settlement as a freeholder, it was held that the other party might show the father's declarations that he held merely under a contract for a deed, and had no title.[3]

In this class of cases, it has been made a question whether, after a *prima facie* right has been established by proof of an apparent adverse possession for a sufficient length of time to confer the title, evidence of the possessor's declarations going to cut down such title, were not inadmissible as coming within the Statute of Frauds. Thus, in trespass, *quare clausum fregit*, it appeared that the parties owned adjoining lots, and the defendant gave evidence of a possession for thirty years, according to a crooked fence between them. The plaintiff straightened the fence, but the defendant tore the straight fence down. The plaintiff offered to prove acts and declarations of the defendant since the expiration of the thirty years, showing that the old fence was built for mutual accommodation, without any view to title, and that the occupation was not adverse. The court said: "It is urged that a

[1] West *v.* Price, 2 J. J. Mar. (Ky.) 380; Pickett *v.* Pickett, 3 Dev. (N. C.) 6.

[2] Youngs *v.* Vredenburgh, 1 John. (N. Y.) 158.

[3] West Cambridge *v.* Lexington, 2 Pick. (Mass.) 536.

complete possessory title was obtained up to the line of the old fence, and that all evidence of acts or declarations, which took place afterward, are irrelevant and inadmissible to prove the character of the previous possession. If the premises are well founded, the argument is sound, and the conclusion logical. But the very question was as to the nature and character of that antecedent possession; and the acts and declarations of the parties owning the estates, made after thirty years, which had a tendency to show their motives and views during the thirty years, were proper to show the nature of the occupancy, and rebut the inference which would otherwise follow from the act of possession. Surely, if a written agreement had been produced, showing that the defendant was allowed to maintain a crooked fence until the plaintiff should choose to have one back upon the true divisional line, it would defeat all claim to the land in dispute on account of the thirty years' possession. Confessions of the party in possession, claiming under that title, his acts and declarations having a tendency to show such arrangement and understanding, are equally competent evidence." [1] In a similar case, in the State of New York, where the possession exceeded twenty-five years, and appeared to have been adverse, the mere declarations of the defendant that the line should have been a straight one, without any express admission showing that his possession had not been adverse, was held not admissible, or rather, not sufficient to entitle the plaintiff to the straight fence which they had built between the two extremities where the defendant said the fence should have run.[2]

The general doctrine that the declarations of a tenant in possession of land are admissible as part of the *res gestæ*, for the purposes explained *supra*, has seldom been denied. A few cases have, apparently through inadvertence, gone the other way; but they have generally been afterwards given up by the very courts in which they were decided. In one case, the defendant in ejectment, claiming that certain tenants in possession held under him, offered to show their ac-

[1] Church *v.* Burghardt, 8 Pick. (Mass.) 327.

[2] Stuyvesant *v.* Tompkins, 9 John. (N. Y.) 61.

knowledgments to that effect, which was denied as hearsay, without apparently adverting to the question whether these acknowledgments might not be considered a part of the *res gestæ*.[1] That they might, was afterwards conceded by the same court in another case, where the usual distinction between being in and out of possession is taken.[2]

It is well settled, however, that the tenant's declarations can in no case be received to shake a clear documental title derived to himself from the owner,[3] or if by parol, to show title in another which could only arise documentally. Either would be a plain violation of the Statute of Frauds.[4]

It is hardly necessary to observe that hearsay making a part of the *res gestæ*, as well as all other declarations, in order to their being competent, *must not only relate to such facts as are susceptible of oral proof, but must also, like other evidence, be relevant to the matter in hand, must bear upon the point of inquiry, and come under subordination to other general rules which govern in the admission of testimony.* All questions of evidence must be considered in reference to the particular circumstances under which it is offered.[5] So also, under similar qualifications, the declarations of persons accompanying their acts of forbearance to take possession, may be given in evidence. The plaintiff claimed a right to the exclusive felling and converting of trees in a certain belt of wood surrounded by tenants, he founding the right on long usage, and sought from this to have a grant or reservation presumed by the jury; and he was allowed to give in evidence the declarations that such was his right, made by the surrounding tenants. It was objected that this was hearsay, but answered that it was a part of the *res gestæ*; for it was accompanied with forbearance by the various tenants who made the declarations, and their landlords, to exercise their right themselves, and leaving the whole to the plaintiff.[6] In a writ of entry the demandant claimed the premises as part of a mill privilege granted to Ham; and to show that it was

[1] Calvett *v.* Fitzgerald, Litt. Sel. Cas. (Ky.) 388.

[2] May *v.* Jones, 4 Litt. (Ky.) 21.

[3] Reading *v.* Weston, 7 Conn. 143.

[4] Burr *v.* Sherman, 6 John. (N. Y.) 19.

[5] Human *v.* Pettett, *ante*.

[6] Stanley *v.* White, 14 East, 332.

within the grant, proved grants from Ham to several persons, of land which they took possession of as the mill privilege, and built a mill. The defendant claimed that the premises in question did not come within the grant to Ham, and was allowed to prove that when the mill built by the grantees of Ham was to be rebuilt, some of the grantees refused to join in the rebuilding, saying it stood on Allen's land, under whom the defendant now claimed. The court say their declarations were admissible as a part of the *res gestæ*. The mere act of abandoning was equivocal as to the motive. The declarations removed the doubt, and were admissible to qualify the act, and in that sense made a part of it.[1]

The declaration of a tenant in possession is constantly received as to whom he held under; not as evidence of title, but as evidence of possession, and the character of the possession.[2]

On a question of settlement it became material to ascertain whether the pauper was domiciled in the town of Canton. He resided there with H. about seven years, being off on excursions and journeys about one-third of the time. He being dead, his declarations of an intention to remove, on going out upon excursions and journeys, were received in evidence as part of the *res gestæ*.[3] The party's own declarations, to show him a sojourner, were received after sixteen years' residence. And, on a question whether one was a citizen of England or the United States, the court allowed his declaration that, in going to England, his object was to claim compensation as a loyalist.[4]

The state of feeling, of sentiment or sanity, may, and must in general be indicated by the declarations of the individual in respect to whom these things are predicated. And where it was sworn by a witness that a testator made confidential communications to him, the testator's declarations, by which he showed suspicion of the witness's honesty, were

[1] Down *v.* Lyman, 3 N. H. 486.

[2] Babb *v.* Clemson, 10 S. & R. (Penn.) 419; Willies *v.* Farley, 3 C. & P. 395; Guidry *v.* Grivot, 2 Mart. (La.) 13; Martin *v.* Reeves, 3 id. 22. And see Highlander *v.* Fluke, 5 id. 442.

[3] Gorham *v.* Canton, 5 Me. 266.

[4] Stansbury *v.* Arkwright, 5 C. & P. 575.

admitted in reply. "These," says TILGHMAN, C. J., "were acts, not merely hearsay. They showed a want of confidence, and the improbability that family concerns of a delicate nature would have been committed to the witness."[1] In a case where the defense was, that the master of a ship was insane, on trial of an indictment for confining him at sea, a journal kept by the master was received in evidence for the prosecution, to show, by the manner of its being kept, that he was not insane; but it was held not evidence for any other purpose.[2] But such acts or declarations, even to show insanity, in a criminal defense, must be *strictly* part of the *res gestæ*. In a case of homicide, by stabbing, the counsel offered in evidence the prisoner's declarations, in connection with his conduct, the morning after the homicide, from which to infer his insanity; but it was not held admissible.[3] Where a prisoner, on trial for murder, produced evidence of declarations by the deceased that he would destroy himself, with a view to raise the presumption that the deceased came to his death by suicide, it was held competent for the State to give evidence of the reasons assigned by the deceased for his declarations.[4]

Sec. 153. Spontaneity of the Acts or Declarations Essential; What is.

As has previously been stated, to make acts or declarations a part of the *res gestæ*, they must be contemporaneous with the main fact, but in order *to be contemporaneous* they are not required to be *precisely* concurrent in point of time. If the declarations spring out of the transaction—if they elucidate it—if they are voluntary and spontaneous, and *if they are made at a time so near to it, as reasonably to preclude the idea of deliberate design*, they are then to be regarded as contemporaneous. The reason for this rule is apparent. That which properly is admissible as a part of the *res gestæ* is admissible *for* as well as *against* the party

[1] Lightner *v.* Wike, 4 S. & R. (Penn.) 203.

[2] United States *v.* Sharp, 1 Peters (U. S. C. C.) 118; Darby *v.* Rice, *ante*.

[3] State *v.* Scott, 1 Hawks (N. C.), 24.

[4] State *v.* Crane, 2 Bail. (S. C.) 66.

making the declaration or doing the acts claimed to form a part of the transaction, and nothing can properly be permitted, which is not so intimately blended with the transaction itself as to wholly preclude the idea that the party was seeking to make evidence for himself.[1]

In reference to acts or declarations forming a part of the *res gestæ*, it must be remembered that they are admissible *for* as well as *against* a party; hence it is that courts have exercised extreme caution not to admit such acts or declarations as arise so long after the transaction to which they relate, that an opportunity is given for deliberate design in manufacturing evidence; and the fact that the declaration is against the interest of the person making it has no bearing in determining the question. If they are fairly detached from the original transaction so as not to be the spontaneous product of it, they are no part of the *res gestæ*.

It is not possible to give a general rule applicable to all cases. The question of the admissibility of such evidence must necessarily depend upon the peculiar facts and circumstances of each case, and rests largely in the discretion of the court. Indeed, there is no one branch of the law of evidence that calls for the exercise of a keener discretion, or more sound judgment, than this. To group the declarations, acts and circumstances attendant upon the principal transaction and determine whether they are natural or artificial, *mala fide* or *bona fide*, is a matter calling into exercise the best faculties of a judicial mind. Instances can be given showing when such evidence has been received, and when it has been rejected; but they furnish no test for another case. Yet the *real* test generally applicable is simply whether the evidence sought to be admitted is of acts, declarations or circumstances so immediately connected with the fact in issue as to be a part of it, and whether they are so far the natural, voluntary, and spontaneous result of it, and are so intimately connected with it in point of time, that they may be said to spring from it, and explain the real nature, character or extent of the transaction itself. It is not essential that they should have occurred at the *precise time* of the

[1] Mitchum *v.* State, 11 Ga. 278; State *v.* Garrund, 5 Oreg. 216.

transaction itself, but they must have occurred at such a time, and in such a manner, and must be so closely allied thereto, as really to form a part of it.[1] The rule undoubtedly is, that to constitute declarations a part of the *res gestæ*, they must be made at the time when the act was done to which they relate and which they are considered as characterizing, and must so harmonize as to be obviously a part of the transaction.[2] Nor must they be narratives of past occurrences, but concomitant with the principal act, and so connected with it as to be regarded as the result and consequence, or as a part of the act itself, and presumed to have been induced by the motive which led to its commission.[3] As was said in the last case cited, they must be contemporaneous with the main fact to which they relate. In fact they must directly relate to the transaction, or be proved as so intimately connected with it and near to it in point of time, that it is manifest that they emanate from and constitute a component part of the same. In other words, the relation between the principal fact, and the declarations or acts sought to be established as a part of the *res gestæ*, that it may be said that the declarations or acts are the declarations and acts of the transaction itself.[4] Declarations of this character are treated as so nearly akin to the principal act itself and so essentially a part of it, that the character of the person making them cannot be inquired into. Thus, where A. and B. were jointly indicted for stealing a hog, upon a

[1] Meek *v.* Perry, 36 Miss. 190; Fifield *v.* Richardson, 34 Vt. 410; Tompkins *v.* Reynolds, 17 Ala. 109; Kearney *v.* Farrell, 28 Conn. 317; Rutland *v.* Hathorn, 36 Ga. 380; Riggs *v.* State, 6 Cald. (Tenn.) 517. An entry made by a banker or merchant in his account book, at the time of the transaction, and in the presence of all the parties, is part of the *res gestæ*; and the book is admissible in evidence to show it, and to corroborate the memory of witnesses. So held, in an action on a check where the issue was whether the money called for by the checks had been paid in settlement or not. Reviere *v.* Powell, 61 Ga. 30. Generally declarations offered merely to strengthen proof of the existence of a fact are not admissible as a part of the *res gestæ*. Corder *v.* Talbot, 14 W. Va. 277.

[2] Moore *v.* Meacham, 10 N. Y. 210; Enos *v.* Tuttle, 3 Conn. 250; Rockwell *v.* Taylor, 41 id. 56.

[3] People *v.* Davis, 56 N. Y. 95; Luby *v.* H. R. R. Co., 17 id. 131; Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 405.

[4] Miller, J., in Greenfield *v.* People, 85 N. Y. 75.

severance A. was convicted. Upon B.'s trial, he offered to prove, by a competent witness, that A., in the presence of the witness, asked B. to go with A. and get his hog, the inference being that B. supposed the hog to belong to A. The testimony was rejected on the ground that, A. having been convicted of an infamous crime, his statements were inadmissible. It was held that the evidence was of the *res gestæ* and was competent, *and that A.'s infamy had nothing to do with it*.[1] Nor is it of any consequence that the party making them would not be a competent witness upon the trial.[2]

Thus in a Missouri case,[3] in an action brought by a

[1] State *v.* Dellwood, 33 La. An. 1229.

[2] 2 id.

[3] Brownell *v.* Pacific, &c., R. R. Co., 49 Mo. 239. But the doctrine of this case has been seriously questioned, and HENRY, J., in Adams *v.* Hannibal, &c., R. R. Co., 74 Mo. 553, says of it, that "it has never been satisfactory to the bar or bench of this State;" and in the case last cited, declaration made by trainmen *immediately* after the accident, "if you had stopped the train when I told you, you would not have killed him," was held inadmissible, HENRY, J., saying: "But few questions of more difficulty are submitted for determination, than those in regard to the admissibility of statements as part of the *res gestæ*. The general principles on the subject are well settled, and if they had been uniformly adhered to in the adjudicated cases, the conflict in the decisions would have been avoided. The declarations of an agent are admissible as evidence against his principal, only when made while transacting the business of the principal and as a part of the transaction which is the subject of inquiry in the suit in which they are offered. They are then admitted as 'verbal acts,' and part of the *res gestæ*. What he may have said before the transaction is entered into, or after its completion, as explanatory, is no more admissible than if made by a stranger. Ladd *v.* Couzins, 35 Mo. 516; McDermott *v.* H. & St. Jo. R. R. Co., 73 Mo. 516; 39 Am. Rep. 526. Anything in the nature of narrative is to be carefully excluded. Bacon *v.* Charlton, 7 Cush. (Mass.) 586." And in Lund *v.* Tyngsborough, 9 id. 42, the same court said: "There must be a main or principal fact, or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it." In Luby *v.* Hudson R. R. R. Co., 17 N. Y. 133, the Court of Appeals observes: "The declarations of an agent or servant do not in general bind the principal. Where his act will bind, his statements and admissions, respecting the subject-matter of those acts, will also bind the principal, if made at the same time and so that they constituted a part of the *res gestæ*. To be admissible, they must be in the nature of original, and not of hearsay evidence; they must constitute the fact to be proved, and must not be the mere admission of some other fact.

widow for damages resulting from killing her husband, it was held that he being injured and almost *instantly* killed,

They must be made not only during the continuance of the agency, but in regard to a transaction depending at the very time." These general principles are recognized by all the cases on the subject, and the conflict between them has arisen in the application of the principles to the facts of the particular case.

The observations above quoted from the opinion of the New York Court of Appeals were made in a case strongly resembling the case at bar. The defendant was sued for negligently running a railroad car, drawn by horses, against the plaintiff, in one of the streets of the city of New York. A police officer was allowed to testify that he arrested the driver directly after the accident, the citizens having stopped the car, and the driver having got outside the crowd which had gathered, and on being arrested assigned as a reason why he did not stop the car that the brakes were out of order. The Court of Appeals held it error to admit the testimony, and observed that "the alleged wrong was complete, and the driver when he made the statement was only endeavoring to account for what he had done. He was manifestly excusing himself and throwing the blame on his principal." Here the servant who remarked to his fellow-servant: "If you had stopped the train when I told you, you would not have killed him," was only endeavoring to exculpate himself and throw the blame on his fellow-servant, and neither his remark nor the reply to it by the other was made in the prosecution of the business of their employer, nor did they immediately precede or accompany the act which led to the catastrophe, or constitute any part of that act, but if admissible at all, would only go to show another fact, and were not of themselves facts to be proved as "verbal acts." They were only intended to prove another fact.

The cases of Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397; Comm. *v.* McPike, 3 Cush. (Mass.) 181, and Brownell *v.* Mo. Pac. R'y Co., 47 Mo. 243, relied upon by respondent's counsel, were not cases in which the declarations of agents were introduced as evidence, but the declarations offered and received were made by the persons injured, or by persons laboring under some disease, and the statements related to the cause of, or to the persons who had inflicted the injury, or to the symptoms and suffering of the invalid. It may be observed in the case of the Insurance Co. *v.* Mosley that Mr. Justice Clifford delivered a very able dissenting opinion, concurred in by Justice Nelson. The case of Comm. *v.* McPike has by more recent decisions of the Supreme Court of Massachusetts been questioned and qualified, if not overruled. See cases *supra*. And the case of Brownell *v.* Pac. R'y Co. has never been satisfactory to the bar or bench of this State. The case of Comm. *v.* Hackett, 2 Allen, 137, is distinguishable from Brownell v. Pac. R'y Co., and Comm. *v.* McPike, *ante*. The facts of that case were that Gillen was stabbed in the nighttime by one who immediately ran away, and the evidence offered was that Gillen at the moment he was stabbed cried out: "I'm stabbed," and a witness for the commonwealth testified that he heard the exclamation and at once went to Gillen and

his declarations as to the manner in which the accident happened were proper evidence as a part of the *res gestæ;* but

reached him within twenty seconds after the exclamation, and was asked: "When you got to Gillen, what did he say?" His answer was: "He said, 'I'm stabbed; I'm gone; Dan Hackett has stabbed me.'" The Supreme Court said: "If it was a narrative statement wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and *who went to him after so brief an interval of time that the declaration or exclamation of the deceased may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted.*" That portion of the opinion which we have italicized indicates the precise ground upon which the evidence was held admissible.

Strictly applying the principles above announced, and "it is dangerous to open the door to the declarations of agents beyond what the cases have already done," was the evidence offered in the case at bar admissible? Were the declarations connected with the calamity as a cause or concomitant? Were they contemporary with the principal transaction and illustrative of its character, or merely a subsequent narrative how it occurred, or an explanation of how it might have been avoided? If the latter, as we think, they were wholly inadmissible, and the court erred in permitting the evidence to go to the jury.

It is not to be denied that some of the authorities cited by respondent's counsel, and others not cited, sustain his position. With few exceptions they are not cases however in which the question of agency is involved, but cases in which the declarations offered were those of persons injured, as to the causes of, or to the persons who inflicted the injuries, and while there may be circumstances which would warrant a less rigorous application of the principle, in such cases we are satisfied that a strict adherence to principle is the better course when it is sought to charge a master for the acts of his servant; and where there is such conflict of authority on a subject, we are inclined to be guided by principle rather than follow adjudications which have departed from it, in the apparent necessity for a departure in a given case. If in the present instance the train could have been stopped after deceased was discovered on the trestle by defendant's servants, that fact can be proved by legitimate testimony. The servants who made the declarations offered in evidence are competent witnesses for plaintiff to prove that her husband was seen on the trestle by the servants managing the train, and that the train could have been stopped before it reached him. It is no answer to this that plaintiff could not rely upon them because they were in defendant's employment. We are not to assume, in order to admit incompetent evidence, that the only person to whom the fact to be proved is known would commit perjury. If plaintiff cannot prove by competent testimony a fact essential to her recovery, we cannot establish a rule in her favor, which in a hundred

if he had lingered for such a time that the declarations could fairly have been said to have been *detached* from the accident,

other cases would probably lead to manifest injustice. But in O'Connor *v.* Chicago, Milwaukee & St. Paul R. R. Co., 27 Minn. 166, it was held that in case of an accident by a railroad train running upon and injuring horses on the track, what was said by the engineer to the conductor of the train *immediately after the accident and after the train had stopped, and while they were examining to ascertain what mischief had been done*, indicating where he first saw the horses on the track, there not appearing anything but the occurrence to cause or procure the statement, may be proved by the plaintiff as part of the *res gestæ*. The court said: "To make declarations of an agent evidence against his principal they must not only have been made while he was engaged in the business of the principal, but they must be a part of the transaction out of which the controversy arises. It is not enough that they refer to or narrate the transaction after it is past; they must be so connected in time and circumstances with the principal fact as to be a part of it. When declarations of an agent or of a party himself are so closely connected with the principal fact as to be a part of the *res gestæ*, is often a very nice question to determine. There are on the point many decisions which appear difficult to reconcile with each other." This ruling is supported by the following cases: Where the action was for injury from a train of cars running over plaintiff's wagon and horses, driven by his servant, it was held the defendant might prove a conversation with the servant at the time of the accident and relative to it. T. & W. Ry. Co. *v.* Goddard, 25 Ind. 185. In an action against a railroad company for damages, caused by delay in the carriage of cattle, the statements relating to the delay of the conductor, made while he had control of the train in which the cattle were, were held part of the *res gestæ*. Sisson *v.* C. & T. R. Co., 14 Mich. 489. In an action against a railroad company for wrongful expulsion from one of its trains, a conversation had immediately after the expulsion, and serving to illustrate its character, between plaintiff and the offending brakeman, was held part of the *res gestæ*. Bass *v.* C. & N. W. Ry. Co., 42 Wis. 654; S. C., 24 Am. Rep. 437. The accident being the running of a railroad train against a peddler's wagon, and the destruction of his goods, the trial court admitted evidence of what was said at the time of the accident, by the engineer in charge of the train, as to negligence in running it. This was held no error by the Supreme Court, which said: "We cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time of the accident, in view of the goods strewn along the road by the breaking of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations made upon the spot at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself." Hanover R. Co. *v.* Coyle, 55 Penn. St. 396.

they would not have been admissible,[1] and the question as to whether such a space of time has elapsed, is one which depends entirely upon the circumstances of each case, *and whether a sufficient time had elapsed, during which the person making them was conscious, so that an opportunity for fabricating a declaration has existed.* Thus, in an Ohio case,[2] in an action for injuries to a person by being thrown into a ditch, evidence of what he said while being helped out was held not to be a part of the *res gestæ*, but an account of a *past transaction.* In another case fifteen minutes,[3] thirty minutes,[4] two hours,[5] two days,[6] one day,[7] between the happening of an event and the declaration, was held too long to admit of it being regarded as a part of the *res gestæ.* But from five to ten minutes was held not to be such a lapse of

[1] Stiles *v.* Danville, 42 Vt. 282.

[2] Cleveland, &c., R. R. Co. *v.* Mara, 26 Ohio St. 185. In Johnson *v.* State, 65 Ga. 94, on trial of J. for assault with intent to murder F., F.'s exclamation, "Oh, Julia," uttered, though half unconsciously, so soon as she, F., was found on the day of the assault, at the moment of the restoration of sensibility,—were held to be part of the *res gestæ.*

[3] Jackson *v.* State, 52 Ala. 305.

[4] Denton *v.* State, 1 Swan (Tenn.), 297; Kinnard *v.* Burton, 25 Me. 39. Thus, in an action for being run over at a railroad crossing, statements made by the plaintiff's driver an half hour after the accident, as to the reason he did not see the train, were held not to be a part of the *res gestæ.* Pittsburgh, &c., R. R. Co. *v.* Wright, 80 Ind. 182. In an action against a railroad company for injuries from the blowing of the whistle frightening the plaintiff's horse, what he said *soon afterwards* as to the engineer's shaking his fist at him, was held not to be part of the *res gestæ.* So also, as to what the engineer said on arriving at the next station, indicating malice. Newsom *v.* Georgia R. R. Co., 66 Ga. 57. A remark by the engineer of the train which ran over plaintiff, made in plaintiff's presence two or three hours after the accident, to the effect that he did not see him until struck by the locomotive, is not admissible. Travis *v.* Louisville & Nashville R. R. Co., 9 Lea (Tenn.), 231. Where a boy, who had driven against a foot-passenger on the street, immediately stopped his horse, and came back and said he did not mean to, held a part of the *res gestæ.* Cleveland *v.* Newsom, 45 Mich. 62. A declaration made some months after a mine was located, and forming no part of the act of location, was held inadmissible as part of the *res gestæ.* Kramer *v.* Settle, 1 Idaho, N. S. 485. Admissions of a conductor, made days after a passenger fell from his train, that he kicked him off, are not part of the *res gestæ.* Moore *v.* Chicago, St. Louis, &c., R. R. Co., 59 Miss. 243.

[5] Rutherford *v.* Com., 13 Bush (Ky.), 608.

[6] State *v.* Dominique, 80 Mo. 585.

[7] State *v.* Ware, 62 Mo. 597; Fourday & Harmon *v.* State, 3 Tex. App. 51.

time as would necessarily prevent it from being so regarded;[1] but in another case a declaration made by a party from three to five minutes after an assault upon him, was held too remote.[2] So in a Wisconsin case[3] the declarations of a person injured by a pistol shot, made after his wound was dressed, and he had taken his seat in a carriage to be taken home, were held not to be admissible. Illustrations of this character might be multiplied indefinitely, but after all, they would afford no sure test in a given case, as to what is in fact a part of the *res gestæ*. The real test is, *whether the principal act and the declarations or acts are detached from each other by such a lapse of time as to make it possible for the parties to speak or act from deliberate design, rather than from instinctive impulse or the natural promptings of the mind.*[4]

Sec. 154. Acts, Etc., Before and After the Principal Facts.

What occurs *after* the principal act is complete, and an opportunity for fabricating an explanation thereof has set in, is no more a part of the *res gestæ*, although it occurs within a very few moments after the act, than is a declaration made several days afterwards.[5] Nor as a general rule can any-

[1] O'Shields *v.* State, 55 Ga. 696.

[2] State *v.* Pomeroy, 25 Kan. 349. So in Hall *v.* State, 48 Ga. 607, a declaration made from ten to twelve minutes after.

[3] Mutcher *v.* Pierce, 57 Wis. 231; 35 Am. Rep. 776.

[4] In State *v.* Garrand, 5 Oregon, 216, the court say to make declarations a part of the *res gestæ* they must be contemporaneous with the main fact; but, in order to be contemporaneous, they are not required to be precisely concurrent in time. If the declarations spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous.

[5] Sorenson *v.* Dundas, 42 Wis. 462. That declarations made by a party after the transaction is ended, or an injury is received, so far detached therefrom in point of time as to admit of deliberate design, or as to be fairly detached from the transaction to which they relate, are not regarded as a part of the *res gestæ*, see Lane *v.* Bryant, 9 Gray (Mass.), 245; Smith *v.* Webb, 1 Barb. (N. Y.) 230; McAdams *v.* Brand, 35 Ala. 478; Osborne *v.* Robbins, 37 Barb. (N. Y.) 481; Simmons *v.* Macon, &c., R. R. Co., 28 Ga. 94; Nelson *v.* State, 2 Swan (Tenn.), 237; Detroit, &c., R. R. Co. *v.* Van Steinberg, 17 Mich. 99; Com. *v.* Harwood, 4 Gray (Mass.), 41; State *v.* Jackson, 17 Mo. 544; Wilson *v.* Sherlock, 36 Me. 295; Stewart *v.* Reddett, 3 Md. 67; Cherry

thing said or done *before* the principal act occurred, *or was within the contemplation of the parties*, be regarded as a part of the *res gestæ*, although only separated by the briefest possible span of time. Thus, in an action against a railway company for injuries to the person, declarations made by the conductor of the train, to a passenger, *a moment before the accident*, as to the bad condition of the road and the number of times his train had run off the track upon consecutive trips next preceding the one in question, was held not admissible in proof of negligence, either as *res gestæ* or an admission by the company.[1] The admission of such declarations made *before* the act, would, except in exceptional cases, be entirely contrary to the fundamental principle upon which the doctrine relating to *res gestæ* is based, *that it explains and unfolds the principal acts by the undesigned acts or declarations of the parties, or others who participated in the act either as actual participants or as witnesses thereof*, because it would hardly be said that what a person said or did *before the principal act was contemplated*,[2] could afford any light either upon

v. McCall, 23 Ga. 193; Carter *v.* Buchanan, 3 id. 513; People *v.* Graham, 21 Cal. 261; Luby *v.* Hudson River R. R. Co., 17 N. Y. 131; Monday *v.* State, 32 Ga. 672; Matteson *v.* N. Y., &c., R. R. Co., 35 N. Y. 487; Kinnard *v.* Burton, 25 Me. 39; Com. *v.* McPike, 3 Cush. (Mass.) 181; State *v.* Dominique, 30 Mo. 585. Indeed, in Friedman *v.* R. R. Co., 7 Phil. (Penn.) 203, it was held expressly that even the dying declarations of the deceased, as to the *cause* of his injuries, could only be given in evidence in an action for negligence. See, also, Marshall *v.* Chicago, &c., R. R. Co., 48 Ill. 475.

In Lambert *v.* The People, 29 Mich. 71, the court admitted statements made by a person who had been robbed, made to persons coming up to him within three minutes after the commission of the crime, as a part of the *res gestæ*.

But if such a time had elapsed as to detach the statements, in point of time, from the transaction itself, the evidence would not have been admissible. Thus, in Hamilton *v.* People, 29 Mich. 171, for burning a barn, it was held that statements made by the respondent after the fire were not admissible.

[1] Mobile, &c., R. R. Co. *v.* Ashraft, 48 Ala. 15. See also Greenfield v. People, 85 N. Y. 75; 39 Am. Rep. 636.

[2] But see State *v.* Thomas, 30 La. An. 600, where declarations of the accused, made *before* the alleged larceny, that the property was his own, were held admissible on his behalf as a part of the *res gestæ*. See also Davis *v.* Zimmerman, 40 Mich. 24, where it was held that such declarations relating to the title of property were, in some cases, admissible as a part of the *res gestæ*, because they tend to explain the acts of the

the motives of the parties, or what they did. *But when the principal act is once in contemplation by the parties, their acts and sayings relating thereto, and which tend to explain or unfold the principal act, from that time until the act is complete,* are held to come under this head.[1] Thus, in a Vermont case,[2]

party relating thereto. See also Haynes v. Lippey, 40 Mich. 602. In a Georgia case, where a quarrel commenced at one groggery and terminated in a homicide at another, during the same night, in the same village, it was held that all that transpired at both groggeries was admissible as *res gestæ*, though some interval of time may have intervened between the beginning and end of the encounter. Stiles *v.* State, 57 Ga. 183.

[1] Where the negotiation for the purchase of a boiler was adjourned from the morning to the evening, resulting in a sale and warranty, evidence was held to be admissible, of statements made by the seller in the morning interview, pertinent to a warranty of its quality and condition. Cunningham v. Parks, 97 Mass. 172.

In a claim case, the claimant set up a deed from the defendant in execution, which was claimed to be fraudulent. A memorandum containing declarations of said defendant, made in the course of giving instructions for preparing the deed the day before its execution, to a scrivener, who was also agent of the claimant, who was absent, it was held admissible in evidence as part of the *res gestæ*. Pearson *v.* Forsyth, 61 Ga. 537.

In Robinson *v.* State, 57 Md. 14 (MILLER and IRVING, JJ., dissenting), upon a trial for abducting several young children of A., it appeared that the accused went to A.'s house during his absence, and drove away a wagon in which was A.'s wife, children and furniture. The evidence for the prosecution tended to show that the wife and children went with the accused through fear of violence induced by his threats. For the defense, the testimony of the occupant of a house at which the party stopped over night was offered to show that the wife said that she left home voluntarily, taking the children and furniture with her, and herself getting defendant to drive the wagon, and that she was not going to live longer with her husband. It was held that this evidence was admissible.

In suit for damages for assault and battery, evidence of what the parties said during the altercation which was followed by the assault is admissible. All the words and acts of the parties, and not detached words and sentences, should go to the jury. So, also, declarations of a bystander made during the progress of such altercation, if necessary to a full understanding of the character of the act complained of. Baker *v.* Guisin, 76 Ind. 316.

In an action for the conversion of personal property, the defense was, that the plaintiff's claim was based on a judgment confessed by J. for the purpose of fraud. On the trial, evidence was admitted of J.'s declarations before sale, while on his way to see one with whom he had made arrangements that he should buy the property. Held that the declarations were admissible, being a part of the fraudulent transaction. Davis *v.* Drew, 58 Cal. 152.

[2] State *v.* Howard, 32 Vt. 380.

where the respondent was indicted for abortion committed upon one Olive Ash, from the effects of which she died, it appeared from the testimony of her sister, who left her home and went to the respondent's house with her, that she supposed her sister to be pregnant and that they, her sister, "left Sutton to get an abortion procured, *as was understood between us at the time we left.*" It appeared from her testimony that at the time when they started out upon this mission, they had not decided *where* to go, and that they did in fact go to the respondent's. These declarations were held admissible as a part of the *res gestæ*, the court saying: "The mere act of going was equivocal; it might have been for professional advice and assistance. The declarations were of the same force as the act of going, and were admissible *as a part of the act.*"[1] In a Georgia

[1] In Hunter *v.* State, 40 N. J. L. 495, a man, afterwards murdered, made statements to his son, and wrote a note to his wife a few hours before leaving home on the night of the murder, to the effect that he was going to the city of Camden on business, and that the prisoner was going with him. It was held that such statements, both oral and written, were admissible as explainations and preparations of the act of going from home. The court said: "Now I think I may safely say that there are few problems involved in the law of evidence more unsolved than what things are to be embraced in those occurrences that are designated in the law as the *res gestæ*. The adjudications on the subject, more especially those in this country, are perplexingly variant and discordant. I can readily find judicial rulings by force of which this testimony would be excluded; but I can as readily find other rulings of equal weight that would sanction its admission. This result has grown out of the difficulty of applying, with anything like precision, general rules to a class of cases of infinite variety. In the well-considered case of Lund *v.* Tyngsburgh, 9 Cush. (Mass.) 42, it is said: 'The *res gestæ* are different in different cases; and it is, perhaps, not possible to frame any definition which would embrace all the various cases which may arise in practice. It is for the judicial mind to determine, upon such principles and tests as are established by the law of evidence, what facts and circumstances in particular cases come within the import of the term.' In the present instance the test thus indicated will be found, I think, in the rule that such declarations as these are admissible, because they are so connected with an act, itself admissible as a part of the *res gestæ*, as to have become incorporated with it. The declaration and the act must make up one transaction. The theory justifying this course is, that when such declarations are thus coupled with a provable act, they receive confirmation from it; but if they stand alone, without such support, they depend altogether for their

case,[1] two persons agreed to fight a duel, and then separated to arm themselves for that purpose, and agreed

[1] State *v.* Cox, 64 Ga. 374; 37 Am. Rep. 76.

credence on the veracity of the utterer, and thus conditioned they are pure hearsay, and inadmissible. Alluding to the rule that excludes hearsay, Mr. Starkie, vol. 1, p. 65, says: 'The principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can reasonably be made.' The present point of inquiry therefore is, whether these declarations of Mr. Armstrong to his son, and his similar declaration contained in the note to his wife, can reasonably be said to be component parts, or the natural incidents of the act of the deceased in going to Camden, which act was incontestably a part of the *res gestæ*. After mature reflection and a careful examination of the authorities, my conclusion is, that these communications of the deceased should be regarded as constituents of that transaction, for I think they were preparations for it, and thus were naturally connected with it. In the ordinary course of things it was the usual information that a man about leaving home would communicate for the convenience of his family, the information of his friends or the regulation of his business. At the time it was given, such declaration could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong, and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. If it be said that such notice of an intention of leaving home could have been given without introducing in it the name of Mr. Hunter, the obvious answer to the suggestion I think is, that a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company? At the time the words were uttered or written they imported no wrong-doing to any one, and the reference to the companion who was to go with him was nothing more, as matters then stood, than an indication of an additional circumstance of his going. If it was in the ordinary train of events for this man to leave word, or to state where he was going, it seems to me it was equally so for him to say with whom he was going. I am unable to see that the reference made to Mr. Hunter by the deceased was not as closely combined with the probable act of his going to Camden as were the inquiries made by Parkman as he passed through the streets of Cambridge, for the house of Dr. Webster, and those inquiries were admitted as evidence by CHIEF JUSTICE SHAW. Report of Webster's case. It is true that in that instance the inquiries happened to be precisely contemporaneous with the act being done; but all the authorities admit that it

to meet again within an hour. The agreement was not carried out, but the respondent sought out the other party

would be absurd to require exact coincidence in point of time between the doing of the act and saying of the words explanatory of it. Thus, in the case already cited from 9 Cush., it is said: 'So declarations, to be admissible, must be contemporaneous with the main fact or transaction; but it is impracticable to fix by any general rule any exact instant of time, so as to preclude debate or conflict of opinion in regard to this particular point. Lord Denman is quite strong in his expressions on this subject, for in Rouch *v.* Great Western R. R. Co., 1 Q. B. 60, he uses this language: 'The principle of admission is, that the declarations are *pars rei gestæ*, and therefore it has been contended that they must be contemporaneous with it; but this has been decided not to be necessary on good grounds, for the nature and strength of the connection with the act are the material things to be looked to, and although concurrence of time cannot but be always material evidence to show the connection, yet it is by no means essential.' In the case now under consideration these declarations are so naturally, and therefore strongly, associated with the act in contemplation, that in my estimation the most exact contemporaneousness of the two things would give no additional force to the connection between them. There is nothing in the case to countenance the notion that any change of purpose occurred between the time of the expression of such purpose and the execution of it, so as there is no extraneous interference, the disclosure of the intention and its performance may be said to be, within the meaning of the authorities, one entire transaction. It is principally from the foregoing considerations that I find myself constrained to think that the declarations under discussion, even if they stood in the case unsupported or unaffected by other circumstances, were admissible, on general principles, on the single ground that they were natural and inartificial concomitants of a probable act, which itself was a part of the *res gestæ*. In such a status of the evidence I should think that the exception to the principle that rules out hearsay had been carried to its extreme limit, but without transcending such limit."

In this case, it must be observed, there was nothing in the declarations going to charge the prisoner with any criminal intent or motive.

In Douglas *v.* Chapin, 26 Conn. 76, the plaintiff's intestate had contracted to go to California and take charge of defendant's steamboat. In an action on the contract, it was held that his statement on leaving San Francisco, that he was going up the river to Sacramento to go on board the boat, was admissible, as part of the *res gestæ*, in proof that he so went. The court simply said, "It was manifestly a part of the *res gestæ*."

In State *v.* Dula, Phillips (N. C.), 211, the deceased was met a few miles from the place where she was murdered, going on horseback in that direction. It was held that her declarations then and there that she was going to that place to meet the prisoner were inadmissible in evidence. The court said these declarations may have been true or may have been false, but were not verified by the tests which the law

and killed him, and it was held that declarations of the deceased *made in the interval*, to third persons, to the effect that

of evidence requires, namely, the sanction of an oath, and an opportunity for cross-examination.

In People *v.* Williams, 3 Abb. Ct. App. Dec. (N. Y.) 596, on an indictment for poisoning, it was held that evidence that the deceased, on going out of the house just before she was poisoned, said she was going to meet the prisoner, was not admissible as tending to prove their meeting, even in connection with her illness on her return, and her attributing it to what he had given her to drink. The court, DENIO, J., said: "To render the declaration competent, the act with which it is connected should be pertinent to the issue; for where the act is in its own nature irrelevant, and when the declaration is *per se* incompetent, the union of the two will not render the declaration admissible. The material fact here was, that the prisoner and the deceased were together on Saturday night. Even this was not a principal fact, but only a circumstance to show that the prisoner had an opportunity to commit the offense. That the deceased left the house in Duane street at a particular time was of no materiality unless it was also shown that during her absence she met the defendant. The act itself was indifferent to the issue, whatever the intention with which it was done. If the deceased met the prisoner, and thus afforded an opportunity of committing the offense, it is immaterial whether she expected or intended to meet him or not; and so of course if she failed to meet him, he could not properly be prejudiced by the circumstance that she went out with a design to go to him. The evidence was not offered to qualify an act connected with the issue, but to induce the jury to infer another act not otherwise shown to exist, that of his being in company with the deceased. Suppose a declaration had been made by the deceased, on the previous day, of an intention to go to her husband on that particular evening; such declaration, being unaccompanied by any act, would rest wholly in assertion, and would be clearly without the rule referred to; yet the proof would be essentially of the same character, and subject to no greater objections than the evidence we are considering. I am of opinion, therefore, that the case was not within the rule admitting a declaration accompanying an act, on the ground of its being a part of the *res gestæ*."

In Carroll *v.* State, 3 Humph. (Tenn.) 315, the declarations of the deceased while on a journey with the prisoner, and in State *v.* Vincent, 24 Iowa, 570, his declarations as to the object of a contemplated journey which he afterward took, were received in evidence. In neither case was there anything in the declarations tending to fasten any criminal intent on the prisoner.

In Check *v.* State, 35 Ind. 492, a witness was allowed to testify to the following declaration by the deceased concerning the prisoner just before his death: "Doc, I am glad you have come; there are two ruffians going up the road, and they have threatened to take my life; they have gone to my house, and I want you to go back with me." The court said: "Was it *res gestæ*? We think not. Bouvier says: 'When it is necessary, in the course of a cause, to inquire into the nature of a particular act, or the intention of the

the respondent was seeking his life, were evidence against person who did the act, proof of what the person said at the time of doing it is admissible evidence as a part of the *res gestæ*, for the purpose of showing its true character.' We think the books may be searched without success, to find a case where the statements of a murdered man, made before he came in sight or hearing of his slayer, can be given in evidence against the accused on his trial."

State *v.* Dickinson, 41 Wis. 299, was a criminal action for procuring the death of a pregnant woman by abortion. It was claimed that the death occurred on Saturday. The witness, Mary Erickson, was permitted to testify as to conversations had by her with the deceased on the previous Wednesday and Friday, in which the deceased stated that she understood or had found out that she was in a family way; that she had been to see the defendant about it; had been or was going to defendant to get medicine and syringe; that she had made an arrangement or bargain with defendant to have an operation performed upon her; was to give $25, and was to return to defendant's on Saturday afternoon for the purpose of having instruments used to get rid of the child. The prosecution offered this evidence to show that the deceased had at that time the intention of having an abortion produced. In his charge the judge so restricted the effect of the testimony, and directed the jury that all the declarations of the deceased made before she was informed she could not live, in which the defendant's name was connected, could only be considered as evidence tending to show that at that time the deceased had formed the purpose to go to the defendant to have an abortion produced upon her, but was not evidence that the defendant actually produced the abortion or had engaged to do it. The court on review said: "The first inquiry is, whether the declarations of deceased to Mary Erickson were admissible for the purpose of showing her intention, and as their scope and effect were restricted by the court, we are of opinion that they were. They constituted a part of the *res gestæ*, were contemporaneous with the main fact under consideration, and were so connected with it as to illustrate its character. 1 Greenl. Ev. 108. It was certainly competent to prove that the deceased went to the house of the defendant at the time it was charged in the information the abortion was produced. Upon the authorities, her intent or purpose in going there might be shown by her declarations then made or previously made, because such declarations became a part of the *res gestæ*. For it is evident the declarations were connected with the act of her going to the defendant, were expressive of the character, motive or object of her conduct, and they are to be regarded 'as verbal acts indicating a present purpose or intention, and therefore are admitted in proof like any other material facts.' 1 Greenl. Ev., *supra;* Insurance Co. *v.* Mosley, 8 Wall. 397; Enos *v.* Tuttle, 3 Conn. 27; Corinth *v.* Lincoln, 34 Me. 310; Lund *v.* Inhabitants of Tyngsborough, 9 Cush. (Mass.) 36; Nutting *v.* Page, 4 Gray (Mass.), 581; State *v.* Howard, 32 Vt. 380; Moore *v.* Meacham, 10 N. Y. 207; People *v.* Davis, 56 id. 96. It is obvious that the mere act of the deceased going to defendant's house was equivocal; it might be innocent or not; it might warrant the inference that she went for proper treatment of some ail-

the respondent on an indictment for murder.[1] In a Tennessee case,[2] upon an indictment for murder, evidence was admitted of the declaration of the deceased, on the evening before he was missed, that he was going to the Pine mountain, to hunt a saltpetre cave. The court said: "It is part of the transaction; explains the reasons why Elrod was in the Pine mountain, and constitutes a fact in the case." "This declaration, made, as it may be said, while on his way, and explaining the reason of his going, constitutes an important fact to elucidate the question of his death." But a declaration, "shortly before his death," that he had been to the mountain, and was going out shortly again, was held inadmissible. There was nothing in the evidence admitted tending to charge the prisoner with the murder, by the mere statement of the deceased. In the same case, on the subsequent trial,[3] evidence was admitted of the statement of the

ment; the declarations would render her motive clear and intelligible. They therefore seem to us as falling under the denomination of the *res gestæ*, and were admissible as original evidence, as distinguished from hearsay.

In People *v.* Davis, *ante*, when the deceased came home, in answer to inquiries from her stepmother she made statements telling what had been done to her by Dr. Crandall at his office, and how he did it, exhibiting certain medicine which she said the doctor gave her, and stated what he told her as to taking it when her pains came on. The court held these declarations incompetent because they were merely narratives of past occurrences, did not become a part of the thing done at the doctor's office, and where therefore no part of the *res gestæ*. But the court say: 'Had it been shown that the medicine was to be taken to aid in producing the miscarriage, what was said in respect to it would have been admissible.' The conclusion which we have reached in view of all the cases upon the subject is, that the declarations of the deceased made to the witness Mary Erickson were so connected with her act of going to the defendant's as to constitute a part of that act, and were admissible as explanatory of that act. See Regina *v.* Edwards, 12 Cox's Cr. Cas. 230."

[1] WARNER, C. J., dissented, but we are inclined to believe that the doctrine announced by the court, while going to the very outer limits, is nevertheless sustained by respectable authorities, and does not impugn the rules and principles applicable to *res gestæ*.

[2] Kirby *v.* State, 7 Yerg. (Tenn.) 259.

[3] Kirby *v.* State, 9 Yerg. (Tenn.) 381. In England such declarations are held not to be a part of the *res gestæ*, and consequently not admissible. Reg. *v.* Wainwright, 13 Cox C. C. 171; Reg. *v.* Edwards, 12 id. 230; Reg. *v.* Buckley, 13 id 293. In the Hayden Case, tried in Connecticut in 1877, the prisoner, a clergyman, was indicted for the

deceased, not only that he was going to the Pine mountain, but also that the prisoner was to accompany him and show him a saltpetre cave. For this error a new trial was granted. The court said: "How how does this statement constitute any part of the thing doing? Whether Kirby was to accompany him or not, could not affect his intentions in going to the mountain, nor could his statement of that fact tend to explain his purpose in going there. His declaration of his own purpose is evidence, because it explains his intentions, and his intentions constitute part of the thing he was doing. He was traveling, and as he was going, he had certain intentions, and as these intentions could only be known by his declarations of them, such declaration is evidence. But it is impossible that Kirby's going with him could constitute any part of the thing which he was doing, which was his own journey."

So, too, *the res gestæ generally remains with the locus in quo and does not follow the parties after the principal act is complete.*[1] Thus, if a party is injured by reason of a defect in a highway, declarations made by him at the place of the injury, immediately upon the happening of the accident, are a part of the *res gestæ;* but after the party has gone away from the *locus in quo*, however soon after the injury, his dec-

murder of one Mary Stannard. The motive for the murder, as was supposed, was the pregnancy of the deceased as the result of illicit intercourse with the respondent, who was a married man. The deceased was found dead in a piece of woods, near which the respondent was at work when the deceased left her home. Upon the trial evidence was admitted that the deceased, on the day of the murder, declared that she was pregnant by Hayden, and that she had seen him that day, and that he had promised to get her some medicine, and that she was going to the woods to meet him and receive it that day. These declarations were admitted by the court, and, while the question was never passed upon by the appellate court, yet there is reasonable ground, judging from former decisions of the court of that State, for believing that the ruling would have been sustained. Douglas *v.* Chapin, 26 Conn. 76. Nor was the rule carried further than it had been carried in other States. State *v.* Vincent, 24 Iowa, 570; Check *v.* State, 35 Ind. 492; State *v.* Hunter, 40 N. J. L. 495.

[1] Prideaux *v.* Mineral Point, 43 Wis. 513. In State *v.* Seymour, 1 Houst. Cr. Cas. (Del.) 508, a declaration made by the respondent after he had gone two hundred yards from the place of shooting, that it was accidental, was held not to be a part of the *res gestæ*.

larations cease to be a part of the *res gestæ*, so far as the *cause* of the accident is concerned. In the Wisconsin case,[1] cited in the last note, statements made by the driver of the carriage, after he returned to the stable with the horses and carriage, as to the cause of the injury, were held not admissible, the court saying: "The *res gestæ* of this accident did not go with the team to the livery stable, but remained in the *locus in quo* with the injured woman; and the declarations of the driver to the liveryman were a subsequent narrative of the *res gestæ*." In another Wisconsin case,[2] which was an action for personal injuries resulting from a pistol shot wound inflicted upon the plaintiff's minor son, it was held that declarations made by the son after his wound was dressed, and he had been placed in a carriage to be taken home, as to the *cause* of the injury, were not admissible as a part of the *res gestæ*. In a New York case,[3] however, such declarations as to the *nature* of the injury, and its extent, made by the injured person, were held to be admissible where the injury resulted from his being thrown from a sleigh in consequence of a defect in a highway, *after* he had got back into the sleigh again. But the distinction between these cases is, that in the one case the declarations related to the *cause* of the injury, while in the other they related to the nature of the person's injury, which with him was a present and continuing fact.[4]

Sec. 155. Illustration of the Rule Relating to Res Gestæ.

Everything is a part of the *res gestæ* which attended and was immediately connected with an act done, so nearly in point of time as to preclude the idea that the act was done or the statement made for the purpose of making evidence for the party, and it is for the jury to determine whether they were made without artifice or premeditation.[5] Thus,

[1] Prideaux *v.* Mineral Point, *ante*.

[2] Mutcher *v.* Pierce, 49 Wis. 231.

[3] Powers *v.* West Troy, 25 Hun (N. Y.), 561.

[4] Declarations made to a physician of bodily feelings and symptoms of pregnancy *at the time of examination* are admissible as a part of the facts on which his opinion is based. But other unconnected assertions in the same conversation charging a person with criminal acts, to procure a miscarriage, are not admissible. State *v.* Gedicke, 43 N. J. L. 86.

[5] Hart *v.* Powell, 18 Ga. 635.

the following matters have been held to be a part of the *res gestæ*, and provable as such: Declarations of bystanders at a public sale ;[1] of a party in possession of property, made at the time of the transfer to him, as to the nature of his possession.[2] So declarations made at the time of delivering money to a married woman, by the person delivering it, in the nature of directions or suggestions as to its disposition, upon the question whether the money was received by her as her husband's or her own ;[3] and the declarations of the wife, made contemporaneously with the delivery of money to another person, to the effect that it was her separate property, and did not belong to her husband. Otherwise, as to her declarations made at the same time, to the effect that the money was the proceeds of her own labor, under an agreement with her husband that she might retain it as her own ;[4] letters addressed by the plaintiff to the defendants to show a legal demand of a conveyance of the land, or for the repayment of the money.[5] Declarations of a principal to a note, as to the relations of the parties whose names were already upon it, made to the plaintiff at the time of obtaining his signature thereto.[6] Everything that takes place between the parties to a verbal contract before its completion.[7] What was said by a constable at the time of making a levy, as to the fact of the levy, and as corroborative of the evidence afforded by the return.[8] The conditions of sale under an execution.[9] Statements made by a physician from his patient while attending him, and confirmed by a *post mortem* examination, in a case where the state of health of the patient is a material issue ;[10] declarations of a public surveyor, when running a line, that he was running a divisional line ;[11] of a party paying money, for the purpose of showing the appli-

[1] Stewart *v.* Severance, 43 Mo. 322.

[2] State *v.* Schneider, 35 Mo. 533.

[3] Hall *v.* Young, 37 N. H. 134.

[4] McLemore *v.* Pinkston, 31 Ala. 266.

[5] Merrill *v.* Downs, 41 N. H. 72.

[6] Whitehouse *v.* Hanson, 42 N. H. 9.

[7] Pierson *v.* Hoag, 47 Barb. (N. Y.) 243.

[8] Grandy *v.* McPherson, 7 Jones (N. C.) L. 347.

[9] Arnold *v.* Gorr, 1 Rawle (Pa.), 223.

[10] Looper *v.* Bell, 1 Head. (Tenn.) 373.

[11] George *v.* Thomas, 16 Tex. 74.

cation or appropriation of the money paid;[1] negotiations between parties, showing to whom credit was given, and explaining the sale in question;[2] declarations of a physician, on leaving home and taking medicine with him, as to the person whom he is going to visit;[3] of a party, at the time of receiving money, to the effect that more was due him, to repel the inference that he received the payment as in full of all demands;[4] of a third person made to, and in the presence of, parties engaged in a controversy at the time of the doing of an act by one of them, which becomes the subject of an action;[5] of a party while engaged in building, as to whom he was at work for, in order to show the nature of the contract;[6] admissions of a principal, if made during the transaction of the business for which the surety was bound; and the acts and sayings of a constable at the time of a levy, in an action against the sureties on his bond, for neglect to return the attachment;[7] declarations of a party accompanying his acknowledgment of service of any process;[8] all that a claimant says to the sheriff at the time of a levy;[9] advice from a shipmaster to the owner's agent abroad, in an emergency caused by the acts of the master;[10] the declarations of the plaintiff in an attachment suit as to his reasons for having it issued, made at the time it was issued;[11] of a donor at the time of the delivery of slaves, that they were delivered to the trustee, pursuant to the provisions of a deed;[12] representations made by a sick person to a medical attendant, of the nature, symptoms, and effect of the malady, under which he is laboring;[13] evidence of a demand of specie by the sheriff, by the direction of the plaintiff in execution, after the property had

[1] Bank of Woodstock *v.* Clark, 25 Vt. 308.

[2] Eastman *v.* Bennett, 6 Wis. 232.

[3] Autauga County *v.* Davis, 32 Ala. 703.

[4] Dillard *v.* Scruggs, 36 Ala. 670.

[5] Gillam *v.* Sigman, 29 Cal. 637.

[6] Printup *v.* Mitchell, 17 Ga. 558.

[7] Dobbs *v.* Justice, &c., 17 Ga. 624.

[8] Feagan *v.* Cuneton, 19 Ga. 404.

[9] Morgan *v.* Sims, 26 Ga. 283; Drumright *v.* State, 29 Ga. 430.

[10] Law *v.* Cross, 1 Black (U. S.), 533.

[11] Wood *v.* Barker, 1 Ala. Sel. Cas. 311; 37 Ala. 60.

[12] Hale *v.* Stone, 14 Ala. 803.

[13] Johnson *v.* State, 17 Ala. 618.

been bid off, and of the purchaser's offer to pay in current bank notes, with the difference between them and specie ;[1] declarations of the grantor, while in possession of property conveyed, to the effect that he held for the grantee ;[2] instructions by one of the parties to his assistant ;[3] the statements of officials made during the prosecution of a work for a municipal corporation to persons engaged upon it, as showing the manner and circumstances under which the work was begun and prosecuted ;[4] of the seller of goods, made at the time of the sale, not only for the purpose of discrediting his testimony, when he had been called as a witness, but also as direct evidence of the sale ;[5] statements made by a mandatary, at the time of a demand and refusal to delivery the property, in which he gives an account of the loss by accident or theft, with the attendant circumstances ;[6] of a grantor, made at the time of executing a conveyance ; and evidence of the intent of the grantor in executing the conveyance, as against him and those claiming under him.[7]

Where a married woman sought to avoid her mortgage, on the ground of duress by her husband, she was allowed to offer evidence of the state of her mind and of her health at the time of her acknowledgment, and that this had been preceded by threats and menaces of her husband, in case she should refuse it.[8]

So, A. having delivered wool to B. to be manufactured, called on him to ascertain what progress had been made, and B. showed him wool, yarn, etc., which he said belonged to A., in an action of trover against C., who attached the wool, etc., as the property of B., it was held that this declaration of B., who afterwards absconded, was admissible as part of the *res gestæ*, to prove that the wool, etc., were the property of A.[9]

[1] Hudson *v.* Crow, 26 Ala. 515.
[2] Johnson *v.* Boyles, 26 Ala. 576.
[3] Nelson *v.* Smith, 28 Ill. 495.
[4] Maher *v.* Chicago, 38 Ill. 266.
[5] Dale *v.* Gower, 24 Me. 563.
[6] Lampley *v.* Scott, 24 Miss. 528.
[7] Gamble *v.* Johnson, 9 Mo. 605 ; Palter *v.* McDowell, 31 Mo. 62 ; Badger *v.* Story, 16 N. H. 168 ; Cheswell *v.* Eastham, id. 296 ; Kent *v.* Harcourt, 33 Barb. (N. Y.) 491.
[8] Central Bank *v.* Copeland, 18 Md. 305.
[9] Pool *v.* Bridges, 4 Pick. (Mass.) 378.

So, on the trial of a real action, after the demandant had given evidence tending to show that the tenant's deed of the demanded premises was not given to him on any pecuniary consideration, the tenant offered in evidence his attested note, given to his grantor a few weeks after the execution of the deed, and the testimony of the attesting witness, that when the note was given, he understood, from the conversation between the grantor and the tenant, that it was given on account of a mortgage on the demanded premises, and to pay the grantor's debts, and that when the note should be paid, the tenant was to have the demanded premises. It was held that this evidence was admissible as part of the *res gestæ*.[1]

So, in an action against a surgeon, for negligently treating a fractured thigh bone, the defendant, in support of his allegation that he had placed the fractured limb upon a double-inclined plane, at an angle of forty-five degrees, or thereabouts, introduced a witness who testified to statements made in the presence of the plaintiff, by the defendant to the witness, at the time when the defendant brought the machine to the plaintiff's house, about the principle upon which the machine operated, and how it might be made a double-inclined plane of any angle, by means of a screw. The evidence was admitted, and on exceptions, the court held that, both as *res gestæ* and as a statement made in presence of the party, they could not say that it was erroneously admitted.[2]

In an action of trover for slaves, the plaintiff claimed under a deed of gift, and the defendant under a subsequent sale on an execution against the donor. It was held that evidence was admissible as to the question of the purchaser's notice of the deed of gift, of a conversation between the purchaser, the donor and the father, the natural guardian of the donees, who were minors, which occurred when the former went to seek information immediately before the sale, he having heard that there was an outstanding title to the slaves.[3]

[1] Blood *v.* Rideout, 13 Met. (Mass.) 237.

[2] Moody *v.* Sabin, 9 Cush. (Mass.) 505.

[3] Black *v.* Thornton, 31 Ga. 641; 30 id. 361.

In trespass by the owner of the land, the defendant set up his occupancy of that portion of the premises upon which the alleged trespass was committed ; the plaintiff endeavored to show an abandonment of the occupancy, by the defendant having moved off the fencing, etc. It was held competent to prove the declarations of the defendant in that regard at the time he was removing the fence, as a part of the *res gestæ*.[1]

Where a managing partner who had been in the habit of borrowing checks for the purpose of meeting his firm's liabilities, a short time before the firm dissolved, called at the office of S. and requested his check, which was made payable to currency, for an hour or so, until he could collect some bills due the firm, but afterwards failed to pay it, and the book-keeper who wrote the check entered at the time upon the stub of the check that it was drawn payable to the firm, it was held that the evidence of the book-keeper in regard to the stub of the check was admissible as part of the *res gestæ* in a suit against the firm to recover the amount of the check.[2]

The cashier of a bank, having left the town under circumstances inducing a suspicion that he had carried away gold belonging to the bank, was arrested by the sheriff, and certain gold found secreted on his person was taken possession of by the sheriff. The bank sued the sheriff for the gold. It was held that evidence by third persons of the declarations made by the arrested persons, to the effect that the gold belonged to the bank, etc., were admissible as a part of the *res gestæ*.[3]

Sec. 156. Declarations of Conspirators, when Evidence Against Co-conspirators.

A well-known example of evidence admissible as part of the *res gestæ* is supplied in the instance of prosecutions which involve a charge of conspiracy. It is an established rule, that where several persons are proved to have combined together for the same illegal purpose, any act done by

[1] Welch *v.* Louis, 31 Ill. 446.
[2] Stark *v.* Corey, 45 Ill. 431.
[3] Boone, &c., Bank *v.* Wallace, 18 Ind. 82.

one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party;[1] it follows, therefore, that any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and so being part of the *res gestæ*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appears that they were used in the furtherance of a common design.[2]

The common design must be first shown before the statements or declarations made by one of them, in the absence of the others, can be given in evidence against the others.[3] Proof of the plot or combination must precede proof of declarations made by either of the alleged conspirators, though the conduct, acts and declarations of the separate parties in the planning or execution of the scheme may be shown as evidence of the common design.[4] And the common design having been proved, the declarations of one of the parties may be shown in evidence against them all.[5]

[1] Charge of BAYLEY, J., in Watson's Case, 32 How. St. Tr. 7. See, also, Brandreth's Case, 32 How. St. Tr. 854, 857; R. *v.* Salter, 5 Esp. 125; R. *v.* Cope, 1 Stark. 144.

[2] Hardy's Case, 24 How St. Tr. 704. What the effect of such evidence will be, must depend upon a variety of circumstances; as, whether the prisoner was attending to the conversation; whether he approved or disapproved. By EYRE, C. J., ib.; Cuyler *v.* McCartney, 33 Barb. 165, 171.

[3] The People *v.* Parish, 4 Denio, 153; Williamson *v.* The Commonwealth, 4 Gratt. (Va.) 547.

[4] State *v.* Simmons, 4 Strobh. (S. C.) 266; Regina *v.* Mears, 1 Eng. Law & Eq. 581; State *v.* Ripley, 31 Me. 386.

[5] Glory *v.* State, 13 Ark. 236. It makes no difference that the person who utters the declaration is not a party to the suit which draws the conspiracy in question. Claylor *v.* Anthony, 6 Rand. (Va.) 285. On an information in nature of a *quo warranto*, to avoid the election of usurping vestrymen in a religious corporation, whose election was objected to as being procured by preconcerted tumult and violence, various conversations in respect to the election among the corporators, at their meeting, and at meetings of certain members of the congregation, and at meetings of certain voluntary societies, were received in evidence in behalf of the commonwealth. And held, that it was properly put to the jury whether what they had heard was relevant, and ought to have any influence as being connected with the election. Com. *v.* Woolser, 3 S. & R. (Penn.) 29, 31. In case of a fraudulent combination to extort money by several persons, which probably continued on foot down to

Where a sheriff is sued for taking property, and he defends on the ground that plaintiff's title is derived through a fraudulent assignment, the declarations of third persons not parties to the action cannot be proved without showing that they and the plaintiff acted on a common purpose to defraud creditors.[1]

The declarations of joint wrongdoers, when received to affect others, are not always confined to the narrow ground of the *res gestæ*. In most instances, the common object being first proved, and the wrong done, admissions by one made long after the injury is complete, may be received to affect the others.

In an early English case,[2] the prisoner was indicted for treason, and was charged with conspiring, together with a person of the name of Jackson, to collect and communicate intelligence to the French government. After evidence had been given of a conspiracy for this purpose, a letter written by Jackson, containing treasonable information, and which had been intercepted, was received in evidence against the prisoner.

Upon the same principle, in another case,[3] a letter written by the chairman of a meeting in London to a delegate sent by that meeting into Scotland, was received in evidence; the letter containing encouragement to that delegate to pro-

the time of the trial, it was held that the declarations of one, being part of the *res gestæ*, were admissible to affect the others. Apthorpe *v.* Comstock, 2 Paige Ch. (N. Y.) 482, 488. The plaintiff, C., holding a bill of sale of personal property, subject to the levy of an execution, the debtors in the execution, who had given the bill of sale to the plaintiff, conspired with M. to procure a sheriff's sale, in the plaintiff's absence, so as to prevent his redeeming the property; and it was sold at auction to M. In trover by C. against certain persons who claimed title through M., the declarations of one of the debtors and M., made about the time of the auction, were held admissible against the defendants, as part of the *res gestæ*. Crary *v.* Sprague, 12 Wend. (N. Y.) 41. See Willies *v.* Farley, 3 C. & P., 395, where a vendor in possession after sale may, by his declarations, affect his vendee, on the ground of the *res gestæ*.

[1] Jones *v.* Hurlburt, 39 Barb. (N. Y.) 403.

[2] R. *v.* Stone, 6 T. R. 527.

[3] Hardy's Case, 24 How. St. Tr. 704. The scruple of EYRE, C. J., in consequence of the letter never having reached its destination, does not appear to have any weight.

ceed in the cause in which he had been engaged by the direction of the meeting in London; and that meeting being composed, amongst others, of the prisoner, the writer of the letter, and the person to whom it was addressed. In the same case, evidence was admitted to prove that Thelwell (who was a member of the Corresponding Society with the prisoner) had brought a paper with him to a printer, and desired him to print it; the paper being considered as evidence to prove a circumstance in the conspiracy. On the same trial numerous letters were read which had been written by co-conspirators in furtherance of the common object, and tracts and other writings distributed by them were received in evidence; being in the nature of verbal acts, for which the prisoner, though not personally present when they were spoken, written or published, was nevertheless responsible. In like manner, consultations in furtherance of a conspiracy are receivable in evidence, as also letters or drafts of answers to letters, and other papers found in the possession of co-conspirators, and which the jury may not unreasonably conclude were written in prosecution of a common purpose to which the prisoner was a party.[1] In a later case,[2] the draft of a letter intended to have been sent by Hardy, as secretary to the Corresponding Society, in answer to another letter, and which was found in Hardy's possession, was admitted. And in the same trial, another letter was admitted, which was written by the secretary of a society at Sheffield, and was addressed to the prisoner, but was found in Thelwall's possession. For the same reason, declarations or writings explanatory of the nature of a common object, in which the prisoner is engaged, together with others, are receivable in evidence; provided they accompany acts done in the prosecution of such an object, arising naturally out of these acts, and not being in the nature of a subsequent statement or confession of them. Upon this principle the expressions of the mob in the Sacheverell riots, that they

[1] Lord Russell's Case, 9 How. St. Tr. 578.

[2] Horne Tooke's Case, 25 How. St. Tr. 220. And see the point respecting letters found in the possession of co-conspirators in Watson's Case, *infra*.

designed to pull down the meeting-houses, were admitted in evidence.[1]

Sec. 157. Statements of Conspirators, when not Part of the Res Gestæ.

But where words or writings are not acts in themselves, nor part of the *res gestæ*, but a mere relation or narrative of some part of the transaction, or as to the share which other persons have had in the execution of a common design, the evidence is not within the principle above mentioned; it altogether depends on the credit of the narrator, who is not before the court, and therefore it cannot be received. Thus, on the trial of Hardy for high treason,[2] a question arose as to the admissibility of a letter written by Thelwell, and sent to a third person not connected with the conspiracy, containing seditious songs, which the letter stated to have been composed and sung at the anniversary meeting of the London Corresponding Society, of which society the prisoner and the writer were proved to be members. The argument in favor of the admission of the evidence was, that the letter was an act done in furtherance of the conspiracy; that the letter contained language of incitement, not merely a narrative or confession by a stranger, and that in such case "*scribere est agere*." The objection was, that the letter contained merely a relation by the writer, that certain songs had been sung, which could not be evidence against the prisoner. The majority of the court decided against the admissibility of the letter. "Correspondence," said EYRE, C. J., "very often makes a part of the transaction, and in that case the correspondence of one who is a party in a conspiracy would undoubtedly be evidence, that is, a correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what had been done, appears a different thing."

Sec. 158. Writings in Possession of Conspirators Before or After Apprehension.

It is in consequence of the distinction between writings or declarations which are a part of the transaction, and such as

[1] 15 How. St. Tr. 552.

[2] Hardy's Case, 24 How. St. Tr. 452, 475. See 32 How. St. Tr. 351.

are in the nature of subsequent statements, but not part of the *res gestæ*, that the admissibility of writings often depends on the time when they are proved to have been in the possession of co-conspirators; whether it was before or after the time of the prisoner's apprehension. Thus, on the trial of Watson,[1] some papers, containing a variety of plans and lists of names, which had been found in the house of a co-conspirator, and which had a reference to the design of the conspiracy, and in furtherance of the alleged plot, were held to be admissible evidence against the prisoner. All the judges were of opinion that these papers ought to be received; inasmuch as there was in the case strong presumptive evidence that they were in the house of the co-conspirator *before* the prisoner's apprehension; for the room in which the papers were found had been locked up by one of the conspirators. And the judges distinguished the point in this case from a point cited from Hardy's Case, where the papers were found, *after* the prisoner's apprehension, in the possession of persons who, possibly, might not have obtained the papers until afterwards.

The principles upon which evidence of the description above mentioned is admitted, are equally applicable to the trial of civil injuries, in the commission of which different defendants have concurred.[2] But evidence of this description is inadmissible in actions where no common motives or object can be imputed, as in actions for negligence;[3] at least it ought not to affect co-defendants where such a consequence can be avoided. And the principle upon which the declarations of associates are admitted in civil actions not less than in proceedings upon criminal charges, only applies where such declarations are strictly a part of the transaction in question.

[1] Watson's Case, 2 Stark. 140.

[2] Powell *v.* Hodgetts, 2 C. & P. 432; North *v.* Miles, 1 Camp. 389; Bowsher *v.* Cally, 1 Camp. 391.

[3] Daniels *v.* Potter, M. & M. 501.

CHAPTER XV.

ADMISSIONS.

SECTION.

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Sec. 159. Admissions of Parties to a Suit.

It is a well settled rule of evidence that the admissions of a party are admissible as evidence *against* him, but not in his favor,[1] except when they form a part of the *res gestæ*, or where,

[1] Jacob *v.* Shorey, 46 N. H. 100; Magee *v.* Raiguel, 64 Penn. St. 110. The declarations of a party in interest are not admissible to show the location of a disputed line, although he has since died, but they are admissible to show that he never acquiesced in another line. Evarts *v.* Young, 52 Vt. 329; Martin *v.* Williams, 18 Ala. 190; Kennedy *v.* Meedor, 1 S. & P. (Ala.) 220; Gordon *v.* Clapp, 38 Ala. 357; Hazen *v.*

although against his interest, they nevertheless make for him upon another collateral issue. As where he has indorsed a payment upon a note or other obligation, in those States where the debt may be renewed by part payment, his indorsement of a payment thereon is admissible in his favor to repel the statute of limitations, provided it was made at such a time and under such circumstances as to repel all idea of it having been made for the purpose of avoiding the statute.[1] But as a rule, except where they go to establish intention,[2] such admissions are only admissible *against* the party making them.[3]

Henry, 6 Ark. 86; Rice *v.* Cunningham, 29 Cal. 492; North Stonington *v.* Stonington, 31 Conn. 412; Heard *v.* McKee, 26 Ga. 332; Scobey *v.* Armington, 5 Ind. 514; Murray *v.* Cone, 26 Iowa, 276; Wright *v.* Haddock, 7 Dana (Ky.), 253; Talbot *v.* Talbot, 2 J. J. Mar. (Ky.) 3; Tipper *v.* Commonwealth, 1 Metc. (Ky.) 6; Tucker *v.* Hood, 2 Bush (Ky.), 85; Handley *v.* Call, 30 Me. 8; Hogan *v.* Hendry, 18 Md. 177; Carter *v.* Gregory, 8 Pick. (Mass.) 165; Jacobs *v.* Whitcomb, 10 Cush. (Mass.) 255; Nutting *v.* Page, 4 Gray (Mass.), 581; Emerson *v.* Lowell Gas Light Co., 6 Allen (Mass.), 146; Hogsett *v.* Ellis, 17 Mich. 351; Milliken *v.* Greer, 5 Mo. 489; Darrett *v.* Donnelly, 38 Mo. 492; Moore *v.* Sanbourn, 42 Mo. 490; Wiggin *v.* Plumer, 31 N. H. (11 Fost.) 251; Judd *v.* Brentwood, 46 N. H. 430; Smith *v.* Kerr, 1 Barb. (N. Y.) 155; State *v.* Jefferson, 6 Ired. (N. C.) L. 305; White *v.* Green, 5 Jones (N. C.) L. 47; Burridge *v.* Geanga Bank, Wright (Ohio), 688; Graham *v.* Hollinger, 46 Penn. St. 55; Williams *v.* English, 64 Ga. 546.

[1] Gibson *v.* Peebles, 2 McCord (S. C.), 418.

[2] Young *v.* Power, 41 Miss. 197; Baker *v.* Kelly, 41 id. 606.

[3] Brown *v.* Brown, 5 Ala. 508; Blann *v.* Beal, 5 id. 357; James *v.* Stockey, 1 Wash. (U. S. C. C.) 330; Freeborn *v.* Smith, 2 Wall. (U. S.) 160; Buswell *v.* Davis, 10 N. H. 413. Declarations of a third party not at the time in possession of the property, unaccompanied by any corresponding act, are inadmissible. O'Brien *v.* Hilburn, 22 Tex. 616. Evidence of the declarations of a person who is competent to testify in the case is not admissible. Bank of Alabama *v.* M'Dade, 4 Port. (Ala.) 252; Field *v.* Suice, 7 Ark. 269; Williams *v.* Kelsey, 6 Ga. 365; Compton *v.* Fleming, 8 Blackf. (Ind.) 153; Flynn *v.* Merchants' Ins. Co., 17 La. Ann. 135; Brown *v.* Mooers, 6 Gray (Mass.), 451; Fanny *v.* State, 6 Mo. 121; Langsdorf *v.* Field, 86 Mo. 440; Howell *v.* Howell, 37 Mo. 124; Alexander *v.* Mahon, 11 Johns. (N. Y.) 185; Woodward *v.* Paine, 15 id. 493; Rowland *v.* Rowland, 2 Ired. (N. C.) L. 61; Persons *v.* Burdick, 6 Wis. 63. And the fact that a person is dead at the time of a trial, who if alive might be a witness, will not make his writings evidence any more than his unsworn declarations would be. Crump *v.* Starke, 23 Ark. 131. Nor is the fact that a witness was taken sick the day previous to the trial a circumstance sufficient to warrant the admission of his declarations on the ground of necessity. Gaither *v.*

If, however, they accompanied the transaction in dispute

Martin, 3 Md. 146. Nor is it a good reason for admitting in evidence the declarations of a third person, not a party to the suit, that such person cannot be examined as a witness. Churchill *v.* Smith, 16 Vt. 560. The declarations of a person exercising authority that he possesses it can never be received as evidence of the fact of his authority. James *v.* Stookey, 1 Wash. 330. Nor can parties give in evidence private conversations or correspondence with each other to rebut evidence of partnership with a third person. Freeborn *v.* Smith, 2 Wall. (U. S.) 160. In detinue, after a demand and refusal to deliver the property has been proved by the plaintiff, the defendant may show that his refusal was qualified, but cannot be allowed to prove his own declarations at the time relative to his title to the property. Brown *v.* Brown, 5 Ala. 508. A party's answer to interrogatories, under the statute in aid of discoveries in common-law suits, if his adversary declines to read them, cannot be considered by the court as evidence for him for any purpose. Wells *v.* Bransford, 28 Ala. 200. Nor are the declarations of the defendant in executions admissible in favor of a claimant of the property levied on, nor in his own behalf, unless they form a part of a conversation proven by the plaintiff in execution. They are admissible in favor of the plaintiff in execution. Brown *v.* Upton, 12 Ga. 505. In a Georgia case, two drovers came to an inn together; one of them told the negro hostler not to tie the horses; he did, however, tie them, and the horse of the other drover was strangled. In an action therefor against the innkeeper, the above direction was admitted in evidence. Jones *v.* Hill, 26 Ga. 194. Gestures are treated as acted language, and are no more admissible than declarations in favor of the party making them. Bowie *v.* Maddox, 29 Ga. 285. In an action against an officer for an escape on *mesne* process, the admissions of the defendant in the original suit may be proved to show a cause of action in such suit. And it is not necessary that such admissions should have been made before the escape. Hart *v.* Stevenson, 25 Conn. 499. But where an action is brought by a minor, through his father as next friend, the father's declarations are not admissible. Hammer *v.* Pierce, 5 Harr. (Del.) 304. As a general rule, the admissions or declarations of a person *not a party to the record* are not admissible in evidence even in the absence of better testimony Ibbitson *v.* Brown, 5 Iowa, 532; Chastain *v.* Robinson, 30 Ga. 55; Berry *v.* Waring, 2 Har. & J. (Md.) 103; Lyman *v.* Gipson, 18 Pick. (Mass.) 422; Wesson *v.* Washburn Iron Co., 13 Allen (Mass.), 95; Bain *v.* Clark, 39 Mo. 252; Forsaith *v.* Stickney, 16 N. H. 575; Jones *v.* Doe, 2 Ill. 276; McCormick *v.* Robb, 24 Penn. St. 44; Kottwitz *v.* Bagby, 16 Tex. 656. Thus the declarations of an absent subscribing witness to a deed are inadmissible to show that it was fraudulently obtained. Shackelford *v.* Purket, 1 A. K. Marsh. (Ky.) 425. And the rule admitting evidence of the declarations of a third person, made in the presence of a party and affecting his interest, is not to be extended to include declarations made before such interest was acquired or known by the party to exist. Ware *v.* Ware, 8 Me. 42. Declarations of one who is neither a party to the

and were a part of the *res gestæ*,[1] or were made in the presence of the other party, and were not contradicted by him,[2] they are competent evidence.

But whether in writing or by parol, they cannot as a rule be used as evidence in his favor. Even an indorsement of part payment on a promissory note is not of itself, and as a matter of course, admissible to take the note out of the Statute of Limitations.[3] So of a credit on an account book, the credit being small in proportion to the account, dated after

record nor a witness are incompetent for the purpose of showing that he is the real party in interest to the action. Ryan *v.* Merriam, 4 Allen (Mass.). 77. Evidence obtained by means of a search warrant is not to be rejected either upon the ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search warrant was illegally issued. State *v.* Flynn, 36 N H. 64. The rule is inflexible that one man cannot be bound by the admissions of another *unless such a relation is previously, and by other evidence, proved to exist between them as will enable one to involve the other in liabilities.* Faulkner *v.* Whitaker, 15 N. J. L. 438; Kilburn *v.* Ritchie, 2 Cal. 145; Atwell *v.* Miller, 11 Md. 348; Commonwealth *v.* Oberle, 3 S. & R. (Penn) 9; Hill *v.* Myers, 43 Penn. St. 170. The declarations of parties at the time of a transaction are usually received as evidence as part of the *res gestæ*. But the declarations of one of the parties at another time, and particularly in the absence of the other, are inadmissible. Ogden *v.* Peters, 15 Barb. (N. Y.) 560; Deveries *v.* Phillips, 63 N. C. 207; Stauffer *v.* Young, 39 Penn. St. 455. So, the declarations of a deceased person, between whom and the person sought to be affected by them there is no privity, are not admissible unless they were against his pecuniary interest existing at the time of the facts admitted, and unless the latter were such that he may be presumed to have had accurate knowledge of them at the time. Bird *v.* Hueston, 10 Ohio St 418. The declaration of one who cannot be sworn as a witness because he is interested or infamous, cannot be received in evidence. Nettles *v.* Harrison, 2 M'Cord (S. C.), 230.

[1] Peppinger *v.* Law, 6 N. J. L. 384; Allen *v.* Duncan, 11 Pick. (Mass.) 308; Sayre *v.* Durwood, 35 Ala. 247; Bayden *v.* Moore, 11 Pick. (Mass.) 362; Warden *v.* Powers, 37 Vt. 619; Holbrook *v.* Murray, 20 Vt. 525.

[2] Green *v.* Harris, 3 Ired. (N. C.) L. 310; Wilson *v.* Pope, 37 Barb. (N. Y.) 321, Johnson *v.* Brockway, 23 Ark. 382; Archer *v.* De Duff, 5 Barb. (N. Y.) 147; Corser *v.* Paul, 41 N. H 24; Bailey *v.* Woods, 18 N. H. 28; Alston *v.* Granthum, 26 Ga. 374; Nusbaum *v.* Thompson, 11 Md. 557; Bradford *v.* Hagerthy, 11 Ala. 698.

[3] Whitney *v.* Bigelow, 4 Pick. (Mass.) 110; Roseboom *v.* Billington, 17 Johns. (N. Y.) 182.

six years have run, and apparently made with a view to elude the statute.[1]

It was said in an early New York case[2] that the indorsement would have been admissible had it been shown to have been made at a time when it was against the interest of the party who made it. But this principle of receiving admissions is by no means universal, nor is it a sufficient reason that the admission is made before any controversy has arisen. Thus, in an action for goods sold, the defendant had been charged as trustee in respect to the debt in question as due to a third person, and had admitted this to be so, and had judgment against him. The debt was in truth due to the plaintiff, though the question was a doubtful one upon the facts. It was held, that the defendant's admissions in the former suit were not evidence for him.[3] In Minnesota, by statute, an indorsement of a payment made upon a note by the payee, at a time when the indorsement was against his interest, is made admissible as evidence of the fact of payment.[4] But in New York an entry in the party's books, though at the time against him, is not afterwards evidence for him. Thus, in another case, on a note payable to the plaintiff's testator, against five persons as makers, one question was, whether two were not principals, and the other three sureties. To show this, the book of the two crediting the note as their own to the testator at its date was offered by the defendants. Though the entry was against the interest of the two at the time, yet it was held that it could not be used in their favor, or in favor of their co-defendants.[5] So, in an action on a note, dated 14th April, 1828, commenced by attaching the goods of the maker, Gregory, on the same day, Peck, a subsequent attaching creditor, was allowed to defend on the alleged ground that the plaintiff's note was a fraud on creditors. A part of the consideration of the plaintiff's note was two orders drawn by Gregory on and accepted by the plaintiff, in favor of two other creditors of Gregory, on the same day.

[1] Taylor's Ex'rs *v.* M'Donald, 2 M'Cord (S. C.), 418.

[2] Roseboom *v.* Billington, *ante.*

[3] Wise *v.* Hilton, 4 Me. 425.

[4] Young *v.* Perkins, 29 Minn. 173.

[5] Schermerhorn *v.* Schermerhorn and others, 1 Wend. (N. Y.) 119.

To show that the orders were accepted anterior to the commencement of the suit, the plaintiff offered in evidence his own declaration to B., a witness, made on the same day, but before the attachment, that he had agreed to pay the debts secured by the orders. They were held inadmissible. The court, by PARKER, C. J., said, "The declarations of a party in his own favor, by the general rule, are inadmissible. There are cases of declarations or entries, operating in favor of the party making them, which are admissible; but in all instances they relate to or accompany some act, and therefore are a part of the *res gestæ*. The declarations excluded in this case were not of that character, but mere naked assertions of a fact, which do not come within any of the exceptions to the general rule. It is said that the declaration so made is a fact. That is true; but the fact is also a declaration only, made by a party to support his own interest. Now it is true that, at the time of making the declaration, it probably had no reference to any controversy. Yet, if it is admitted that such declarations are good evidence, we shall soon find cases of declarations and assertions of a fact as having happened, with a view to support what may be afterwards done, when it is too late to have its effect, and when it may become necessary to antedate, if we may use the expression, the fact in controversy."[1] In Massachusetts, the return and acts of a ministerial officer are denied as evidence in his favor. Thus, in trespass by the plaintiff, a deputy sheriff, he proved that he had attached certain property of S., which was afterwards removed by the defendant. The defendant, another deputy, offered in evidence a writ and his own return upon it, showing that he had attached the same property the day before, and also, that on the day before he was seen at work within view of the property, and told a witness he had attached it. It was held that neither the return nor declarations were admissible, not being a part of the *res gestæ*.[2]

[1] Carter *v.* Gregory, 8 Pick. (Mass.) 165, 168, 169.

[2] Merrill *v.* Sawyer, 8 Pick. (Mass.) 397, 398. But see Cornell *v.* Cook, 7 Cow. (N. Y.) 310, 313.

Letters written by a party are not evidence for him.[1] Thus, in ejectment by the proprietor of Pennsylvania, the defendant showed a deed to himself. The plaintiff offered a letter from William Penn, the proprietor, to show that the grant was on a condition not performed. It was rejected on the ground that a man cannot create evidence for himself.[2]

If a party's declarations or admissions which, when taken in one way, are evidence against himself, are not to be received for him; if his letters in his own favor are to be excluded, it follows of course that other oral or written declarations, either indifferent at the time or favorable to his own interest, are inadmissible. Accordingly, in an action against A. & B., as partners, on a contract executed in the partnership name, A. suffered a default, and B. pleaded the general issue. It was held that letters written by A. in the partnership name could not be read in evidence by B., a partner with A.[3]

The registry of a vessel procured by a party is no evidence for him, though it may be against him.[4] A survey, though ancient, made by direction of the owner of the land, for his own convenience, is not admissible evidence for him or those claiming under him.[5] On a question whether the plaintiff, to whom cotton was consigned as a factor of the defendant, had sold it in a foreign market, it was held that the plaintiff's letters, averring and inclosing an account of sales of the cotton, among other articles, though offered merely with the view of fixing the defendant with notice and subsequent acquiescence in the correctness of the accounts, and so to infer the sales, were inadmissible.[6] In an action against alleged partners, the declarations of the defendants, made subsequent to the commencement of the alleged partnership business, are not admissible for them to limit its nature and extent, as to show it an agency the one for the other; though an agreement between them, at or before its commencement,

[1] Fowle *v.* Stevenson, 1 John. Cas. (N. Y.) 110; Champlin *v.* Tilley, 3 Day (Conn.), 303, 306.

[2] Proprietary's Lessee *v.* Ralston, 1 Dall. (U. S.) 18.

[3] Champlin *v.* Tilley, 3 Day (Conn.), 303, 306.

[4] Ligion *v.* Orleans Nav. Co., 7 La. An. 682.

[5] Jones v. Huggins, 1 Dev. (N. C.) 223.

[6] Anthoine *v.* Coit, 2 Hall (N. Y.), 40.

would be.[1] A written communication, made by the defendant to the plaintiff, in respect to the claim of the latter, was held inadmissible in evidence for the defendant.[2] In an action for fraudulently passing the bills of a broken bank, the plaintiff was denied liberty to prove that he showed the bills to the witness and stated that he had them from the defendant — even to show how the witness's attention was drawn to the bills, and thus strengthen the inference that he had correctly identified them with bills which he had before seen in the hands of the defendant.[3] An inventory made and returned by an administrator, after an action commenced by him for the recovery of the property inventoried, is not evidence for him.[4] The admissions of a debtor against the garnishee in a foreign attachment are not receivable; for they go to throw the claim from the debtor upon another.[5]

Even an officer's return upon a process is not admissible in his favor to prove any fact stated therein except such as are required to be stated. Thus, in an action against a sheriff for not returning an execution within thirty days, his return, indorsed thereon, that he omitted to do so by reason of sickness, is not admissible to prove the fact; for it is no part of his office to make such a return.[6] Therefore it is no more than a written declaration by a private person. It is the same, although the declarant is dead, and his declarations are offered for his estate. Thus, in trover for bonds of the intestate, the defendant, the intestate's son, insisted the intestate gave them to him. The intestate's declarations tending to negative this, made in the defendant's absence, were held inadmissible.[7] A corporation is in this respect on the same footing with natural persons. Thus the North Carolina State Bank, being a mere private corporation, its books of accounts of bank dealing, in a suit between the

[1] Mitchell *v.* Roulstone, 2 Hall (N. Y.), 351.

[2] Birkbeck *v.* Burrows, 2 Hall (N. Y.), 51.

[3] Watson *v.* Osborne, 8 Conn. 363.

[4] Allender *v.* Riston, 2 G. & J. (Md.) 86.

[5] Enos *v.* Tuttle, 3 Conn. 247.

[6] Bruce *v.* Dyall, 5 Mon. (Ky.) 125.

[7] Romig *v.* Romig, 2 Rawle (Penn.), 241; Scull *v.* Wallace, 15 S. & R. (Penn.) 231.

bank and a third person, were held not admissible as evidence for the former.[1]

So the statements of a party's agent are not admissible for him, unless a part of the *res gestæ*. Thus the letters of an agent giving his principal an account of what had taken place in respect to the matter of his agency were held to be inadmissible for his principal, even after the agent's death.[2]

The admission of a party's declaration in his own favor, if objected to, is fatal on error, although the court below directs the jury to disregard it.[3] Nor can the defendant prove a conversation between himself and the plaintiff's agent, to show admissions by the latter after the business of the agency has been closed, because the agent's declarations bind his principal only when they are a part of the *res gestæ*, and his own declarations could only be admissible as forming a part of the conversation in which the plaintiff participated.[4]

There are, however, some exceptions to the rule that a party's declarations or admissions shall not be received as evidence for him. These exceptions arise in general when they are connected with some circumstance giving the evidence a force beyond what it can have as a mere naked assertion. Accordingly, a constable's return is evidence for him in an action for taking the goods away under pretense of a previous levy.[5] And there seems no good reason why this should not be so. Indorsing a return is part of his office. It is an act, not only a part of the *res gestæ*, but the *res gestæ*

[1] State Bank of N. C. *v.* M'Neil, 1 Hawks (N. C.), 36.

[2] Norton *v.* Smith, 4 Mon. (Ky.) 314.

[3] Tuttle *v.* Hunt, 2 Cow. (N. Y.) 436; Penfield *v.* Carpenter, 13 John. (N. Y.) 350; Fisher *v.* Bailey, 1 Ashm. (Penn.) 209.

[4] Budlong *v.* Van Nostrand, 24 Barb. (N. Y.) 25. In Meserole *v.* Archer, 3 Bosw. (N. Y.) 376, the court held it admissible to show the agent's declaration to her principal in reference to an act done and the reply; and in Bedell *v.* The Com. Ins. Co., 3 id. 147, evidence of conversations between the agent of the defendants and one West was admitted after it had been proved that the agent had been referred by the insured to West as the person who would settle the whole matter. But the general rule stands firm, that the declarations of a party cannot be received in his own favor. Isles *v.* Tucker, 5 Duer (N. Y.), 393; Erben *v.* Lorillard, 19 N. Y. 299.

[5] Cornell *v.* Cook, 7 Cow. (N. Y.) 310, 313.

itself. On what other principle is it that the record of a justice, drawn up for the very purpose, long after the conviction, will protect him against an action ?[1] But to make a return evidence for the officer, it must be strictly within his official duty ; for where he indorsed that he had omitted to return within the required time by reason of sickness, this was held out of his duty, and therefore not admissible for him.[2]

A certificate of a justice of a judgment, execution or other proceeding in a cause before him, is evidence for himself. It may be made out after the expiration of his office.[3] And in an action by an officer for property levied on by him, his own indorsement on the execution of the property levied on is evidence to identify the property.[4]

An indorsement of part payment upon a promissory note, everything about it appearing fair, is admissible as evidence to the jury to take it out of the Statute of Limitations, and will control, unless the defendant impeaches it in some way.[5] As where the note was for four hundred dollars, and the indorsement, bearing date two years after the date of the note, was of three hundred and fifty dollars, leaving a balance of only fifty dollars. Or where it is proved that the indorsement was in truth made when it was against the interest of the party who made it.[6] In such case it will be received to rebut the presumption of payment arising from the lapse of time. But this is not the rule where the statute requires the promise to be in writing in order to remove the statute bar, or requires the evidence of payment to be in writing under the hand of the party to be affected thereby.

Where the party's declarations are a part of the *res gestæ*, they are evidence for him.[7] Thus, although the declara-

[1] Fawcett *v.* Fowles, 7 B. & C. 394; Rogers *v.* Jones, 3 id. 409; Mather *v.* Hood, 8 John. (N. Y.) 44; Bridgett *v.* Coyney, Esq., 1 M. & R. 211, *per* LORD TENDERDEN, C. J.

[2] Bruce *v.* Dyall, 5 Mon. (Ky.) 125, 126.

[3] Maynard *v.* Thompson, 8 Wend. (N. Y.) 393.

[4] Spoor *v.* Holland, 8 Wend. (N. Y.) 445.

[5] Gibson *v.* Peebles, 2 M'Cord (S. C.), 418.

[6] Roseboom *v.* Billington, 17 John. (N. Y.) 182.

[7] Smith *v.* Morrow, 7 Mon. (Ky.) 234.

tions of a testator of the plaintiffs in general are not evidence for his executors, yet, where he had been administrator of the defendant's intestate, never having brought in his account, and this omission was urged against him as showing that he knew he had no claim, it was held that his declarations that the intestate's estate was indebted to him might be received to rebut the inference sought to be raised.[1] So, on a trial for forcible entry and detainer, the question being upon the relator's entry, and the extent and nature of his possession, he having proved that he was in possession, was allowed to show his own declarations as to its extent, and the person under whom he held.[2]

The question whether, and how far, the introduction of the defendant's confession or declaration in evidence by the plaintiff, *et sic e converso*, will make it evidence for the party who made it, has arisen principally upon the confessions of prisoners on trial for crimes. By these cases and others, the following general doctrine seems to be well established:—*A party's declarations are evidence in his favor when introduced by his opponent, although their truth may be contradicted by contrary declarations of the former, or by other evidence; and the whole shall go together to the jury, who are not bound to credit the exculpatory confession*[3]

A party's declarations are, of course, inquirable into, in order to test the credit of a witness; as, if the witness has stated them in a certain way, then the party may contradict him by showing what in truth he did say at the time, in order to correct or discredit the witness.[4]

Where there is direct evidence tending to show that an assignment of a legacy, absolute on its face, was in reality collateral security for an antecedent debt, previous and subsequent declarations of the assignee in reference thereto, made to third parties, are admissible as corroborative evidence,[5] and the fact that they are contained in the plead-

[1] Scull *v.* Wallace, 15 S. & R. (Penn.) 231, 233.

[2] Smith *v.* Morrow, 7 Mon. (Ky.) 234, 236.

[3] Rex *v.* Jones, 2 C. & P. 629; Rex *v.* Higgins, 3 id. 603; Rex *v.* Clewes, 4 id. 221; Rex *v.* Steptoe, 4 id. 397; Smith *v.* Blandy, Ry. & M. 207.

[4] People *v.* Scott, Judicial Repository (N. Y.), 50.

[5] Kutz's Appeal, 100 Penn. St. 75,

ings filed in the cause does not affect their competency.[1] And, if made in the presence and at the instance of others having a like interest with him, they are evidence against them;[2] and they are admissible in evidence against the person making them, although the witness testifying to them did not hear the whole of the conversation of which they form a part.[3]

Upon the question of the defendant's right to maintain a dam, evidence that the plaintiff at one time made the defendant an offer for the land, stating that he wanted to buy it so that he might remove the dam, is competent as showing that the plaintiff recognized the defendant's right to maintain the dam.[4]

In cases where the rights of creditors, forced heirs or other third persons are in no manner affected, the declarations and admissions of the husband, made at a time not suspicious, that certain property belongs to his wife and was acquired by her, in her own right, by purchase or otherwise, in the absence of any charge of fraud or error, are legal and proper, and sufficient evidence against himself or persons claiming through him. And such admissions may be proved under the general issue.[5] So, in an action on an account, the admission that the account was correct is an admission that it was correct as to all its items.[6] A paper rejected as a contract may nevertheless, by admissions contained therein, bind a party to it.[7]

Letters written by, or at the instigation of, a party to an action to third persons, warning them not to aid the other party or to testify, or urging them to testify to a particular state of facts, are in the nature of admissions by conduct, and are admissible in evidence, and this, although they were written before suit brought, if the controversy preceding the suit was pending at the time.[8]

Where an agreement between husband and wife, made

[1] Adams *v.* Utley, 87 N. C. 356.
[2] Tredwell *v.* Graham, 88 N. C. 208.
[3] State *v.* Pratt, 88 N. C. 639.
[4] Lynn *v.* Thomson, 17 S. C. 129.
[5] Brown *v.* Stroud, 34 La An. 374.
[6] Keller *v.* Jackson, 58 Iowa, 629.
[7] Bishop *v.* Fletcher, 48 Mich. 555.
[8] Snell *v.* Bray, 56 Wis. 156.

before marriage, is set up as a bar to her right to recover dower in his estate by the heirs of the deceased husband, and the widow seeks to avoid the agreement as obtained from her by her husband's fraud, his declarations that the agreement was void or invalid, or good for nothing, and like expressions, are admissible in connection with other evidence as tending to show the alleged fraud.[1] In an action on the case for erecting too high a dam, the plaintiff sought to introduce a declaration made by the grantor of those under whom the plaintiff and defendant claimed, to the effect that the dam was too high, the grantor being dead, and the declaration not being against interest, but rather in its favor, was held to be inadmissible.[2] In an action by the widow of H. to recover of A. certain land claimed by A. under a parol promise of H. to convey, etc., declarations of H. were held to be admissible against the plaintiff, she claiming as H.'s widow and as grantee of H.'s heirs at law, and accordingly being in privity with H. So, declarations of the mortgagor or his agent amounting to a license to the mortgagee to sell the land, are admissible.[3] But a party cannot escape the force of adverse evidence by introducing his own statements made before the trial to his attorney.[4]

When, at the trial, the witnesses for one of two colliding vessels testified that the bow light of their vessel was burning, and on the day after the hearing of the cause the owners of the vessel caused the court to be informed, by their counsel, in open court, that, although the light was burning, it was covered with a tarpaulin at the time of the collision, it was held that such a statement, made under such circumstances, though forming no part of the evidence given at the trial, must be regarded as an admission given in the cause of the fact so stated.[5] In an action by an administrator upon a claim belonging to the estate, declarations made by him when not acting in the discharge of his duties, and to per-

[1] Wentworth *v.* Wentworth, 71 Me. 72.

[2] Putnam *v.* Fisher, 52 Vt. 191; 36 Am. Rep. 746.

[3] Atwell *v.* State, 63 Ala. 61.

[4] Vanneter *v.* Crossman, 42 Mich. 465.

[5] The Harry, 9 Ben. (U. S. C. C.) 524.

sons having no connection with the claim, are not competent evidence against him.[1] Facts stated in letters not replied to are not necessarily deemed to be admissible.[2] A release of "all actions, and rights of action," given by the plaintiff to the defendant for valuable consideration, after suit brought, is not an admission by the defendant of indebtedness at the commencement of the suit.[3] The fact that a claimant gave notice of a trial of the right of property levied on under an execution, and that no trial was had, is held not to be an admission of the validity of the judgment, service, and return of process.[4] In a prosecution for adultery, the question to the defendant, on cross-examination, whether his wife had not made a complaint against the other party for the alleged offense, cannot be admitted on the theory that the wife could not prosecute without his assent.[5]

When the admissions of a party afford any presumption against him, they are admissible.[6]

Thus the plaintiff, in an action for suffering the defendant's loaded cart to remain in the highway, introduced a witness who testified that the defendant, after the plaintiff received the injury complained of, said: "I did not mean to remove the cart and wood until somebody got injured, and then make known who put them into the traveled road;" and afterwards said: "What would you do? I am provoked every day. I won't touch the wood, if half the town runs into it and gets killed." It was held that such testimony was admissible, as it tended to prove that the defendant knew the situation of the cart and wood; that he recognized them as his own, and had not abandoned them, or resigned his claim to any trespasser; that he had a reasonable time to remove them, but purposely permitted them to remain; and as it furnished, also, strong evidence of the recklessness

[1] Church *v.* Howard, 79 N. Y. 415.

[2] Meguire *v.* Corwine, 3 MacArthur (D. C.), 81.

[3] Crawford *v.* McLeod, 64 Ala. 240.

[4] Ledford *v.* Weber, 7 Ill. App. 87.

[5] People *v.* Knapp, 42 Mich. 267.

[6] Phelan *v.* Bonham, 9 Ark. 389; Goodnow *v.* Parsons, 36 Vt. 46; Wells *v.* Fairbanks, 16 Vt. 516; Tenney *v.* Evans, 14 N. H. 343; Hardy *v.* De Leon, 5 Tex. 211; McGill *v.* Ash, 7 Penn. St. 297; Doyle *v.* St. James' Church, 7 Wend. (N. Y.) 78; State *v.* Littlefield, 3 R. I. 124; Jones *v.* Morgan, 13 Ga. 515.

of the defendant, and might thus legitimately affect the question of damages in the case.[1]

In another case, the plaintiff in an action on a guaranty, for the purpose of proving notice to the defendant of the plaintiff's acceptance of the guaranty and of the sale made under it, offered the declarations of the defendant that he knew of the existence of the guaranty; that he asked why the claim had not been presented to the commissioners on his estate; and that, in the conversation, he made no objection that notice had not been given him, but said, if the claim was not outlawed, and it was a continuing guaranty, he would pay it. It was held that such declarations were admissible.[2]

So where the defendant admitted to the officer who arrested him, in a suit on an open account, that the account was correct, although it was not then shown to him, the amount only being stated, it was held that there was some testimony before the jury for the plaintiff, and they refused to set the verdict aside.[3] The admission might not have the effect of establishing the *amount* that was due, but it operated to show that something was due from him.

In an Indiana case, an action was commenced by A. before a justice of the peace, and taken by appeal to the circuit court. It was held that on the trial on appeal the defendant might prove admissions which had been made by the plaintiff as a witness in a previous suit in the circuit court, brought by one B. against the defendant.[4]

In an Alabama case, it appeared that B. obstructed the waters of a brook so that they flowed upon the land of M. P. and W. afterwards purchased B.'s land, and maintained the obstruction. It was held in an action against them by M. that P.'s admissions as to the injury to the plaintiff's land from the overflow of water upon it, made a number of years before P. purchased an interest in B.'s land, were admissible against him.[5]

If he has given a reason for his conduct which is false, its

[1] Linsley *v.* Bushnell, 15 Conn. 225.
[2] White *v.* Reed, 15 Conn. 457.
[3] Sugar *v.* Davis, 13 Ga. 462.
[4] M'Kinzie *v.* Reneau, 8 Blackf. (Ind.) 411.
[5] Polly *v.* McCall, 37 Ala. 20.

falsity may be shown to enable the jury to infer the true reason.[1] So statements made by a party may be shown by way of inducement or illustration of other evidence.[2]

So they may be shown, although otherwise incompetent, where other parties have been induced to act upon them so that they would be prejudiced if they were withdrawn, and in such a case the party is estopped from denying their truth.[3]

A party's admissions of marriage are competent evidence in support of a plea in abatement for the non-joinder of her husband.[4] In an action upon an account stated by the plaintiff, but not signed by the defendant, it was held that the amount might be proved by the acknowledgment of the defendant.[5]

In an action where notice to the defendant was necessary before action brought, it was held that the admission by the defendant that he had received notice before the action was brought might be given in evidence, although not made until after the action had been commenced.[6]

In an action of assumpsit two witnesses were produced by the plaintiff, who testified to conversations had with the defendant, in which the defendant requested one of them to procure the loan of a certain sum of money from the plaintiff, this loan being the fact in issue; the plaintiff produced a third witness to testify to a conversation between himself and the defendant about the same time, in which the defendant spoke of his intention to apply for the same loan that the testimony of the other witnesses showed that he did apply for. It was held that the testimony of such third witness was admissible.[7]

Evidence given at a former trial by A. was offered as his admission, he being a party to the suit wherein it was offered. It was held that it might be introduced to prove such admission without the production of the record of the former trial.[8]

[1] Tompkins *v.* State, 17 Ga. 356.
[2] Grimes *v.* Talbot, 1 A. K. Mar. (Ky.) 205.
[3] Tompkins *v.* Phillips, 12 Ga. 52.
[4] Laughlin *v.* Eaton, 54 Me. 156.
[5] Vinal *v.* Burrill, 16 Pick. (Mass.) 401.
[6] Dole *v.* Young, 24 Pick. (Mass.) 250.
[7] Clark *v.* McGraw, 14 Mich. 139.
[8] Kutzmeyer *v.* Ennis, 27 N. J. L. 371.

In a New York case the plaintiff brought an action against the defendant for setting fire to his barn. Prior to the trial, the plaintiff had made certain declarations as to the description of the horse which the person who was supposed to have fired the barn rode upon the night of the burning. The plaintiff was not at that time at home, and when he made these declarations, stated that his information was derived from persons in the vicinity of the fire on the night in question. On the trial, the plaintiff introduced numerous witnesses to show that the defendant, on the night of the fire, rode a horse of a very different description. It was held that the former declarations of the plaintiff were admissible in evidence, as tending to show that the description relied upon by the plaintiff's witnesses was an afterthought, on the discovery having been made that a horse answering the description testified to was in possession of the defendant on the night of the fire.[1]

But where a lessor entered the chamber of his lessee with a light, and shortly afterwards the premises were destroyed by fire, it was held that declarations of the defendant, that the burning of the house and furniture was all his doing, that he had been into the chamber with a lighted candle and thought the house must have taken fire from the candle, were not sufficient evidence to prove that he was negligent or careless in the use of the candle.[2]

A statement made by another person, or a conversation carried on in the presence and hearing of a party, to which he made no reply, cannot be received in evidence against him as an implied admission on his part of its truth, *unless it was of such a character as would naturally call for a response from him, and he was in a situation in which he would probably have replied to it.*[3]

But the declarations of one party, made in the presence of the other which do naturally call for a reply, and which are

[1] Stephens *v.* Vroman, 18 Barb. (N. Y.) 250.

[2] Lansing *v.* Stone, 37 Barb. (N. Y.) 15.

[3] Lawson *v.* State, 20 Ala. 65; Spencer *v.* State, 20 id. 24; Wilkins *v.* Stidger, 22 Cal. 221; Rolfe *v.* Rolfe, 10 Ga. 143; Abercrombie *v.* Allen, 29 Ala. 281; Brainard *v.* Buck, 25 Vt. 573; Hersey *v.* Burton, 23 Vt. 685.

not denied by the other, are admissible as evidence for the former.[1]

Thus, in a suit against an administrator for taking care of his intestate while a minor, the defense was that the latter lived with the plaintiff's father, A., and that the services sued for were rendered by him. The presence of the minor at A.'s house having been proved, it was held that evidence was admissible of A.'s declarations, made when the minor was introduced into the family, to show in what relation he stood to it.[2]

A party is not called upon to dispute an account on every occasion on which it may be presented: and when evidence of any act or declaration of a party is given, as tending to prove the account, *care should be exercised in determining whether the circumstances required the defendant to dispute the account*, so as to cause his omission to do so to have weight against him.[3]

Declarations relating to the subject-matter of a suit, made by a third person, in the presence of a party to the suit, and to which such party had an opportunity to reply, but did not, are admissible in evidence against him. And such evidence cannot be controlled by proof of different declarations subsequently made by the same person (who died before the trial) to others.[4] But it must be shown that the other party heard the declarations, or was in a situation where he ought to have heard them, or they are not admissible against him. Thus declarations made by one claiming a right of way, concerning it, in the presence of the owner of the estate, but not heard by him by reason of deafness, are inadmissible in evidence against him.[5]

[1] Block v. Hicks, 27 Ga. 522; Hagenbaugh v. Crabtree, 3 Ill. 225; Bailey v. Woods, 17 N. H. 365; Corser v. Paul, 41 N. H. 24; McClenkin v. McMillan, 6 Penn. St. 366; Wells v. Drayton, 1 Mill (S. C.) Const. 111; Hendrickson v. Miller, 1 id. 296; Drumright v. State, 29 Ga. 430; People v. McCrea, 32 Cal. 98.

[2] Maxwell v. Ratliff, 26 Ind. 157.

[3] Churchill v. Fulliam, 8 Iowa, 45; United States v. Kuhn, 4 Cranch (U. S. C. C.), 401; Bright v. Coffman, 15 Ind. 371; Gibnay v. Marchay, 34 N. Y. 301.

[4] Boston, etc., R. R. v. Dana, 1 Gray (Mass.), 83; Turner v. Yeates, 16 How. (U. S.) 14.

[5] Tufts v. Chartown, 4 Gray (Mass.), 537.

The silence of a tenant for life, when remarks are made in his presence in disparagement of his title, is held to be no evidence against his remainderman.[1]

In an action upon a contract which the plaintiff made through an interpreter, statements concerning the contract by the interpreter in the name of the plaintiff are admissible against the latter, without proof that they were truly the plaintiff's statements.[2]

Statements made in the presence of and hearing of a party, without contradiction by him, will not be construed as an admission by him of their truth, unless the truth of the statements must necessarily have been within his knowledge.[3]

Where a party omits to assert his claim to one or more large sums of money when all his demands are submitted to an arbitrator, such conduct is construed as an admission, to be properly used against him when subsequently setting up a claim to the same money. Such conduct, however, is open to explanation by the party, as resulting from accident or mistake.[4]

An admission will never be presumed from mere silence, under the bare assertion of a claim, even though the claim is made by the party in whose favor it is asserted. But if a party in answer to such a claim makes any declarations as to his own rights, the whole conversation must be submitted to the jury.[5] If, however, the statement calls for a reply, and it is of such a character that if it was not true the party would naturally deny it, his silence is admissible as tending to show that the statements were true. Thus the omission of a party to reply to statements in a letter about which he has knowledge, and which, if not true, he would naturally deny, especially when he replies to other parts of the letter, is evidence tending to show that the statements so made and not denied are true.[6]

Declarations or admissions, after the execution of a will,

[1] McGregor *v.* Wait, 10 Gray (Mass.), 72.

[2] Camerlin *v.* Palmer Co., 10 Allen (Mass.), 539.

[3] Edwards *v.* Williams, 3 Miss. (2 How.) 846.

[4] Moore *v.* Dunn, 42 N. H. 471.

[5] Mattocks *v.* Lyman, 16 Vt. 113.

[6] Fenno *v.* Weston, 31 Vt. 335.

by one of several legatees, who is also the executor and proponent of the will, tending to show undue influence, and want of mental capacity on the part of the testator, are not admissible in behalf of the contestants, where the legatees are not jointly interested, and there is no proof of conspiracy or combination between them.[1] Nor are the declarations of two or more persons who are shown to have been engaged in a common unlawful purpose admissible in evidence against the others, if made *after the completion of the unlawful purpose*.[2] In an action where a recovery may be had against the principal alone or against both himself and the surety, admissions made by the principal after breach of the obligation should not be received as against the surety.[3] The declarations of a partner, made in procuring a loan, to induce parties to become sureties for the partnership, or to become sureties of a renewal thereof at maturity, during the existence of the partnership, if acted on in good faith, are binding upon the partners.[4] In an action against G.'s administrator and P., on an alleged partnership debt of P. and G., the administrator denied the partnership, and P. admitted his individual liability, and pleaded his discharge in bankruptcy, which was not controverted. It was held that declarations by P., tending to prove his liability as a partner of G., were not admissible.[5] In an action by a wife to recover for wrongfully and maliciously procuring her husband to abandon her, his declarations, made in the defendant's absence, as to the cause of abandoning her, are inadmissible.[6] Declarations of a party made after suit brought, or after a rupture between the parties, are clearly inadmissible.[7] And the declarations of a grantor, after parting with his title, are not evidence to support or impeach it in the hands of the grantee; but, if part of a conversation is given by one party, the other may inquire into the whole.[8] Mere verbal decla-

[1] La Bau *v.* Vanderbilt, 3 Redf. (N. Y.) 384.

[2] Phillips *v.* State, 6 Tex. App. 364.

[3] Lee *v.* Brown, 21 Kan. 458.

[4] McKee *v.* Hamilton, 33 Ohio St. 7.

[5] Cowan *v.* Kinney, 33 Ohio St. 422.

[6] Westlake *v.* Westlake, 34 Ohio St. 621.

[7] Wetmore *v.* Mell, 1 Ohio St. 26.

[8] Posterns *v.* Posterns, 3 W. & S. (Penn.) 127.

rations, that a release had been executed, will not be sufficient to establish the existence of a deed, more particularly where there is no other evidence to support the presumption of its having been executed.[1] Nor are the declarations of a party interested in the matter in controversy, if made at a time when he had no interest.[2] A party to a suit cannot be estopped by his oral admissions to a third person, if by independent evidence he shows that these admissions were contrary to the truth.[3] Admissions made with a view to a compromise are not admissible.[4] Nor those contained in a deposition *in perpetuam*, or declarations made by the deponent at the time of giving the deposition.[5] Nor those made by the defendant or his attorney, not made to the plaintiff or in his presence.[6] Nor the confession of a party to a real action, that he had previously conveyed his right in the premises.[7] An admission by a party to a suit, that the suit must go against him, is not admissible.[8] Nor confidential overtures for pacification, or other propositions between litigating parties. But an offer to pay a debt in property instead of money is not an offer of compromise.[9] Nor the declaration of a party that a witness introduced by him knew nothing of the matter in controversy.[10] Nor that he had been served with a subpœna.[11] Nor a declaration by a party of an intention merely to do a certain act; except in connection with evidence tending to show that he actually did it.[12] Nor the statement of the plaintiff to a third person, in the presence of one of the defendants, not addressed to him, nor calling for any reply, and not replied to by him.[13] Nor whatever may be his interest in the matter in dispute, unless charged with knowledge of the acts complained of, are

[1] Lands *v.* Crocker, 3 Brev. (S. C.) 40.

[2] Burton *v.* Scott, 3 Rand. (Va.) 399.

[3] Husbrook *v.* Strawser, 14 Wis. 403.

[4] Wilson *v.* Hines, 1 Minor (Ala.), 255; Rideout *v.* Newton, 17 N. H. 71; Wood *v.* Wood, 3 Ala. 756; Perkins *v.* Concord R. R., 44 N. H. 223; Williams *v.* Thorp, 8 Cow. (N. Y.) 201; State *v.* Dutton, 11 Wis. 371.

[5] Dwinel *v.* Godfrey, 44 Me. 65.

[6] Green *v.* Sprogle, 16 Md. 579.

[7] Barnard *v.* Pope, 14 Mass. 434.

[8] Crockett *v.* Morrison, 11 Miss. 3.

[9] Ferry *v.* Taylor, 33 Mo. 323.

[10] Clarke *v.* Mershon, 2 N. J. L. 70.

[11] Hasbrouck *v.* Baker, 10 Johns. (N. Y.) 248.

[12] Bullock *v.* Beach, 3 Vt. 73.

[13] Gale *v.* Lincoln, 11 Vt. 152.

his acts or admissions evidence to affect his co-defendants.[1] Unsworn pleadings are never admitted as evidence against the pleader in another suit between him and other parties, as admissions or declarations of the facts contained in them. Still less would a party be bound by an expression of opinion as to the extent of his legal rights or liabilities.[2] In Missouri, where a plaintiff, in an action before a justice of the peace, examines the defendant, he cannot, on appeal to the circuit court, be allowed to prove the declarations of the defendant in testifying before the justice of the peace.[3] Evidence of admissions by a party that he authorized another to give a note to a third person for a specified sum, does not warrant the reading in evidence of a note corresponding with the note thus authorized to be made, without proof of its having been duly made.[4] A failure of title to lands can be shown only by documentary evidence; still, a witness, in testifying to conversations with the party responsible in damages, may speak of such failure, if the plaintiff disavows all benefit of proof of failure of title arising from such conversations.[5] The contents of a letter which is lost, containing a memorandum of an admission, cannot be used as evidence, where the writer of it can only say that what he wrote was undoubtedly true, but that he has no recollection of the contents of the letter, except that it contained a proposition of settlement.[6] An admission contained in an undelivered instrument is not binding upon the party whose hand and seal are attached to it.[7] Where the question to be determined is the sanity of a person, both the acts and declarations of the person are evidence for the purpose of ascertaining the state of mind of the actor; but the effect of his acts and declarations on a third person, on the day before the homicide, cannot be shown, nor his acts and declarations then made in the absence of the accused.[8] As a general rule, a

[1] Dawson *v.* Hall, 2 Mich. 390.
[2] Crump *v.* Gerock, 40 Miss. 765.
[3] Martien *v.* Barr, 5 Mo. 102.
[4] Minard *v.* Mead, 7 Wend. (N. Y.) 68.
[5] Morris *v.* Wadsworth, 17 Wend. (N. Y.) 103.
[6] Clute *v.* Small, 17 Wend. (N. Y.) 238.
[7] Robinson *v.* Cushman, 2 Den. (N. Y.) 149.
[8] Lake *v.* People, 1 Park. (N. Y.) Cr. 495.

paper executed by a third person cannot be admitted as evidence of the truth of its recitals, when his declarations to the same effect would be inadmissible, on the ground of being hearsay evidence.[1] In an action brought for services in negotiating the purchase of real estate, a declaration of the plaintiff to the vendor of the land is inadmissible to show the amount the plaintiff was to receive for his services from the vendee.[2] Nor are admissions admissible to prove the contents of a written instrument, without its absence is accounted for by proof of notice to produce it on proof of its loss. The absence of the instrument in another State is not a sufficient reason for admitting parol evidence of its contents.[3]

Sec. 160. Whole Admission must be taken together.

An important rule relating to the admissions of a party is, that *the whole statement containing the admission must be taken together*, whether the admission is verbal or written; for although some part of it may contain matter favorable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained.[4] But

[1] Garrigue *v.* Losher, 3 Bosw. (N. Y.) 578.

[2] Erben *v.* Lorillard, 19 N. Y. 299.

[3] Threadgill *v.* White, 11 Ired. (N. C.) L. 591.

[4] Thomson *v.* Austen, 2 D. & Ry. 361; Fletcher *v.* Froggart, 2 C. & P. 569. It is a principle well settled, that the admissions of a party, where given in evidence, must be taken together, as well what makes in his favor as what makes against him. Storer *v.* Gowen, 18 Me. 174; Howard *v.* Newson, 5 Mo. 523; Reas *v.* Hardy, 7 Mo. 348; Taylor *v.* Whiting, 2 B. Mon. (Ky.) 268; Arnold *v.* Johnson, 2 Ill. 196; Newman *v.* Bradley, 1 Dall. (U. S.) 240; Farrel *v.* McClea, id. 392; Kammell *v.* Bassett, 24 Ark. 499; Wilson *v.* Calvert, 8 Ala. 757; Ward *v.* Winston, 20 Ala. 167; Barnum *v.* Barnum, 9 Conn. 242; Ives *v.* Bartholemew, id. 309; Bristol *v.* Warner, 19 Conn. 7; Morris *v.* Stokes, 21 Ga. 552; Withers *v.* Richardson, 5 T. B. Mon. (Ky.) 94; Turner *v.* Jenkins, 1 Har. & J. (Md.) 161; Whitwell *v.* Wyer, 11 Mass. 6; O'Brien *v.* Cheney, 5 Cush. (Mass.) 148; Moore *v.* Ross, 11 N. H. 547; Kelsey *v.* Bush, 2 Hill (N. Y.). 440; Carver *v.* Tracy, 3 Johns. (N. Y.) 427; Wailing *v.* Toll, 9 id. 141; Credit *v.* Brown, 10 id. 365; Hopkins *v.* Smith, 11 id. 161; Tenner *v.* Lewis, 10 id. 38; Perego *v.* Purdy, 1 Hilt. (N. Y.) 269; Overman *v.*

though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does

Coble, 13 Ired. (N. C.) L. 1; Devlin *v.* Killcrease, 2 McMull. (S. C.) 425. But the jury may believe a portion and disregard the rest. Coon *v.* State, 21 Miss. 246; McCann *v.* State, id. 471; Licett *v.* State, 23 Ga. 57; Field *v.* Hitchcock, 17 Pick. (Mass.) 182; Green *v.* State, 13 Mo. 382; Mattocks *v.* Lyman, 18 Vt. 98; Wilson *v.* Calvert, 8 Ala. 757; Brown's Case, 9 Leigh (Va.), 633. Where the evidence was, that the defendant, on being shown the plaintiff's account, said: "It is correct, but I have an offset," and no evidence was offered to prove any offset, it was held that a recovery for the amount of the plaintiff's account was warranted by the evidence. Delamater *v.* Pierce, 3 Den. (N. Y.) 315, 610. So where, in trover, a witness testifies that the property in question belongs to the plaintiff, that, as authorized by him, she pledged it on certain terms to the defendants, telling them the property was the plaintiff's, it was held is not erroneous to allow the witness to state what she told the plaintiff was the bargain made. Meserole *v.* Archer, 3 Bosw. (N. Y.) 376. If a defendant relies upon an admission in a bill in equity, he must, as a general rule, take the whole of such admission. Stuart *v.* Kissam, 2 Barb. (N. Y.) 493. But there are exceptions to this rule. Thus, while the declarations of a party in possession of land, or of personal property, are admissible as explanatory of his possession, it is not permissible to prove everything he said in respect to the title, how it was acquired, etc., and an inquiry embracing so extensive a scope should be rejected. McBride *v.* Thompson, 8 Ala. 650. Nor can the declaration of a party be made evidence in his own favor on the ground that they were made in a conversation, part of which was called out on a cross-examination by the other party. Lynch *v.* McBeth, 7 How. (N. Y.) Pr. 113. Where the declarations of a vendor are given in evidence against him, in order to prove representations made by him at the sale, it is competent to prove *everything he said at the time upon the subject*, but not what he said subsequently. Bradford *v.* Bush, 10 Ala. 386. All that was heard of a party's admissions may be given in evidence against him, although more was said which was not heard. State *v.* Covington, 2 Bailey (S. C.), 569; Mays *v.* Deaver, 1 Iowa, 216; Williams *v.* Keyser, 11 Fla. 234. The rule that where confessions or admissions are introduced by one party, the opposite party is entitled to the whole conversation, does not give such party a right to the whole conversation of the witness, because he has stated some of his remarks necessary to the understanding of what the party said. Young *v.* Bennett, 5 Ill. 43. Where a party offers in evidence the admissions of an opponent, though the whole admission must be taken and weighed together, it is not necessary that the jury should find it to be wholly true, or wholly reject the evidence. It must all be received as testimony for their consideration; but the truth of the whole, or any part, may be judged of from the declaration itself or from other testimony overruling or controlling those portions of the admission making against the party offering it. Pearson *v.* Sabin, 10 N. H. 205. And a court or jury may, on sufficient ground, believe part

not follow that all the parts of the statement should be regarded as equally deserving of credit; but the jury must consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him.[1] The presumption or probability that those portions of a party's statement which are against his interest are true, is supposed to give credit to other parts of the same statement, with respect to which there is no such presumption, but perhaps a contrary presumption. A statement therefore received for the purpose of proving facts therein stated by him against his interest, is not to be excluded with respect to other facts stated which are in his favor.[2] It is, however, to be understood that the several parts of a statement are not necessarily entitled to equal credit; the jury may believe one, and reject the other.[3]

And where the party, to substantiate a credit in his favor, produces an account made out by the opposite party, though he renders it evidence in the first instance to prove the debits against himself in the same account, yet this is not conclusive, and he will still be at liberty to disprove the debits,[4] or impeach them by showing them erroneous on their face.[5] And where, in an action for the price of one-half of a steamboat sold, the defendant admitted that he purchased it, but

and disbelieve another part, yet such parts must be distinct, and relate to different matters of fact. Fox *v.* Lambson, 8 N. J. L. 275. The rule that a party's admissions are to be taken altogether, is limited to what was said at the time. Edwards *v.* Ford, 2 Bailey (S. C.), 461; Hatch v. Potter, 3 Ill. (2 Gilm.) 725; People *v.* Green, 1 Park. (N. Y.) Cr. 11. And the declarations of a party on one day, as explanatory of what was said by him on another day, and which was given in evidence, cannot be shown by testimony. Blight *v.* Ashley, Pet. (U. S. C. C.) 15.

[1] Berman *v.* Woodbridge, 2 Doug. 788, *per* Lord Mansfield; Smith *v.* Blandy, Ry. & M. 259, *per* Best, C. J.; Cray *v.* Halls, cited id. 258, *per* Abbott, C. J.; Whitwell *v.* Wyer, 11 Mass. 6, 10; Garey *v.* Nicholson, 24 Wend. (N. Y.) 350; Kelsey *v.* Bush, 2 Hill (N. Y.), 440.

[2] Beckham *v.* Osborne, 6 M. & G. 771.

[3] Berman *v.* Woodbridge, 2 Doug. 788; Rex *v.* Clewes, 4 C. & P. 221; Smith *v.* Hunt, 1 McCord (S. C.), 449.

[4] Walden *v.* Sherburne, 15 John. (N. Y.) 409; Turner *v.* Child, 1 Dev. (N. C.) 134.

[5] Jones *v.* Jones, 4 Hen. & Munf. 447.

said he had paid for it, the plaintiff was allowed to disprove the latter branch of the confession by circumstances; and the jury thinking it was overcome, the court refused to disturb the verdict, the court saying: "Confessions must be taken together: but when extra-judicial, as in this case, the weight of evidence by which they may be rebutted depends on all the circumstances of the case as disclosed by testimony."[1] So, where the evidence in *assumpsit* for money lent was, that the defendant said, "I borrowed the money, but I paid it," the jury were instructed that the confession must be received together, but that they were not bound to credit the assertion of payment; and they found for the plaintiff, owing to some slight evidence which tended to repel the assertion of payment.[2] In an action for wages, as mate of a vessel, against the master, the latter said he was captain, but never engaged the plaintiff, who was employed by the owner. The court told the jury they must take the whole together, unless the part in his favor was inconsistent or improbable. The defendant had a right to choose his mate, though employed by the owner; and the mate had a threefold remedy, one against the master, the same as a common sailor had; and gave the opinion of the court, that if the plaintiff served with the defendant's permission, he was liable.[3] In another case, the plaintiff proved that he presented his account to the defendant, who said, "It is just, but I paid it by a man in Petersburgh; and had I time, I could prove it." The court said: "The rule is, that a confession shall be taken together; but if there are circumstances mentioned in the confession which, when examined into, disprove the matter alleged in discharge, or where that matter can be disproved, the jury are to reject it, and go upon the other part of the confession only; as where he says, 'The account is just, but I paid it before such persons,' and they know nothing of the payment: or at such time and place, and it be proved that at that time he was not at the place, but at another, for

[1] Quick *v.* Johnson, 6 Mart. (La.) 532, 533. And see Thommon *v.* Kalbach, 12 S. & R. (Penn.) 238, 240.

[2] Newman *v.* Bradley, 1 Dall. (U. S.) 240.

[3] Farrel *v.* M'Clea, 1 Dall. (U. S.) 382.

distant; or if he says, 'The account is just, but I will prove it paid if I have time,' and he is allowed that time and called upon to make that proof, and does not; in such and the like cases, the matter in discharge will be rejected."[1] In stating an account, the creditor charged *inter alia* $150 for a wagon, which was the only item proved, and made the balance due to him $84, after giving several credits. He, at the time of stating the account, admitted that the wagon had been paid for, which, if he had not been allowed his other charges, would have made a balance the other way. The jury considered the written statement and confession all together, and discredited the latter, allowing the balance as struck. This was held proper. The court said the jury must judge what credit is due to any part of a statement, written or oral.[2] The defendant confessed he had committed a homicide by shooting at the vital parts of a negro, declaring at the time he intended to hit his legs; but other proof showed him within ten feet of the negro when he shot, so that he might have hit his legs if he had chosen. In trespass by the owner of the negro, it was held that the jury might reject the latter part of the confession and act on the first.[3]

On a reference to take an account, the defendant claimed to have allowed to him credits for large disbursements contained in an account produced against him by his adversary. But the account did not say to whom nor for what the payments were made, nor did it give particulars of time; several items were discredited, and one had been allowed in another and distinct account. CHANCELLOR KENT, on hearing exceptions to the master's report, said: "There is no doubt of the general rule, that when one party exhibits a paper in proof to charge his opponent, his opponent is entitled to use it in his discharge. But it does not follow that each part is entitled to the same credit. The charge may be so clear and specific as to be conclusive, while the discharge is so loose and defective as to deserve no credit. We have seen that those discharges are inaccurate in some instances;

[1] Barnes *v.* Kelley, 2 Hay. (N. C.) 45.

[2] Turner *v.* Child, 1 Dev. (U. S.) 133, 134.

[3] Arthur *v.* Wells, 2 Rep. Const. (S. C.) 314.

that they have no precision or certainty as to place or circumstance, that we have evidence of the allowance of part on other proof, and of the *positive* injustice of other parts; and we are justified and bound, upon all sound principles, to reject the whole."[1] Though, where a confession or declaration is given in evidence, a court and jury may, on sufficient ground, believe part and disbelieve another part, *yet such parts may be distinct and relate to different matters or facts*, as, "I acknowledge that *I borrowed the money*, but I *repaid it*."[2]

When an account is presented to a party, containing items on both sides, and showing a balance against him, and he answers, "It is correct, but I have an offset," this is sufficient to authorize a verdict for the balance admitted to be due, no other evidence of the set-off being given.[3] The whole conversation relating to the admission may be given: that which tends to discharge the party making the admission, as well as that which tends to charge him.[4] But the referee or jury is not bound to give equal credit to every part of the conversation or declaration;[5] and it is proper for the court so to charge the jury.[6]

In an English case,[7] in an action for goods sold and delivered, one of the plaintiff's witnesses stated, upon cross-examination, that he had heard the plaintiff say that the goods were sold under a written contract, which the plaintiff at the time showed the witness; a broker's note was then produced by the plaintiff's counsel, which the witness said was the paper spoken of. It was objected that the broker's note

[1] Method. Ep. Ch. *et al.* *v.* Jacques *et al.*, 3 John. Ch. (N. Y.) 115–117.

[2] Fox *v.* Lambson, 7 N. J. Eq. 255.

[3] Delamater *v.* Pierce, 3 Den. N. Y.) 315.

[4] Dorlon *v.* Douglass, 6 Barb. (N. Y.) 451; Coon *v.* The State, 13 S. & M. 246, 471; Duffield *v.* Cross, 12 Ill. 397; Roberts *v.* Gee, 15 Barb. (N. Y.) 449.

[5] Beares *v.* Copley, 10 N. Y. 93.

[6] Barnes *v.* Allen, 30 Barb. (N. Y.) 653.

[7] Smith *v.* Blandy, Ry. & Mo. 257; Cray *v.* Halls, cited id., where Abbott, C. J., left the whole of a conversation to a jury to consider whether the facts asserted by a party in his own favor were not true, as well as those against him. And see Remmie *v.* Hall, Manning's N. P. Dig. (2d ed.), 376, cit. 3 M. & G. 834.

ought not to be received as evidence of the contract, unless the broker was called to prove it. But the objection was overruled, and it was held by BEST, C. J., that the whole of what a party says at the same time must be given in evidence, though what he says in his favor must not on that account be taken as true, but must be left, with all the circumstances, for the jury to consider whether they believe it or not. And in another case[1] it was held that where a person admitted a claim, but at the same time set up a counterclaim, the statement of the counterclaim was admissible to prove not only its existence, but also its truth and correctness.

It will be seen that the rule, simple as it appears, is not without difficulty in its practical application. It should be stated that it *applies equally to written and verbal admissions;* and, consequently, where a defendant has rendered a debtor and creditor account to the plaintiff, which the latter produces in proof of his demand, it will be equally admissible in evidence of the defendant's set-off,[2] although the plaintiff will be at liberty, while relying on the creditor side of the account, to impeach items which appear on the debtor side.[3] If the admission is contained in an affidavit, a written examination,[4] an answer in Chancery, or other document complete in itself, the rule at common law is, that the whole document must be read, although the jury need not give equal credit to every part of it, and will frequently give credence only to such portions as make in favor of the declarant;[5] and so stringent is this rule, that where, on exceptions taken, a second answer had been filed, the defendant

[1] Randle *v.* Blackburn, 5 Taunt. 255. And see Thompson *v.* Austen, 2 D. & R. 361; Fletcher. *v.* Froggatt, 2 C. & P. 569; Green *v.* Dunn, 3 Campb. 215; Smith *v.* Young, 1 Campb. 439; Barrymore *v.* Taylor, 1 Esp. 325; Com. Dig., tit. Evidence, B, 5; 12 Vin. Ab., tit. Evidence, A, 23; 2 Ventr. 171; Cooper *v.* Smith, 15 East, 103.

[2] Randle *v.* Blackburn, 5 Taunt. 245.

[3] Rose *v.* Savory, 2 Bing. N. C. 145; 2 Sc. 199, S. C.

[4] In Prince *v.* Samo, 7 A. & E. 630, COLERIDGE, J., asked whether the question had ever been decided as to depositions, to which the counsel replied that no express decision had been found.

[5] Bermon *v.* Woodbridge, 2 Doug. 788; Blount *v.* Burrow, 4 Brown, C. C. 75.

was allowed to insist upon having that also read, in order to explain what he had sworn in his first answer.[1] It has also been held that a party, against whom an answer in chancery is produced, may have the whole bill read as part of his adversary's case, on the ground that this is like the ordinary case of a conversation, where the answers of a party cannot be given in evidence against him without also proving the questions which drew forth the answers. The jury, however, should in such cases be warned that the statements in the bill are not admissions of the facts contained therein, it being notorious that allegations not consistent with fact are frequently introduced into a bill for the sole purpose of eliciting truth from the opposite party.[2] Where the plaintiffs, who were assignees of a bankrupt, gave in evidence an examination of the defendant before the commissioners as proof that he took certain property, the court held that they thereby made his cross-examination evidence in the cause; and as, in this cross-examination, the defendant had stated that he had purchased the property under a written agreement, a copy of which was entered as part of his answer, this statement was considered as *some evidence* on behalf of the defendant himself of the agreement and its contents; and that, too, although the absence of the document was not accounted for, and notice not been given to the plaintiffs to produce it.[3] So, in an action against a sheriff, where an under-sheriff's letter was produced by the plaintiff to affect the defendant, it was held to be some evidence also of certain facts stated therein, which tended to excuse the sheriff;[4] and on a similar principle, where, in order to fix a sheriff in an action of trespass against him, the plaintiff put in his warrant under which the seizure was made, and which recited the writ of *fi. fa.*, the court held that this recital was some evidence of the writ, and consequently tended to

[1] R. *v.* Carr, 1 Sid. 418; B. N. P. 237; Lord Bath *v.* Bathersea, 5 Mod. 10; Lynch *v.* Clerke, 3 Salk. 154.

[2] Pennell *v.* Meyer, 2 M & Rob. 98, *per* TINDALL, C. J.; 8 C. & P. 470, S. C.

[3] Goss *v.* Quinton, 3 M. & Gr. 825.

[4] Haynes *v.* Hayton, 6 L. J. K. B. (O. S.) 231, recognized in Bessey *v.* Windham, 6 Q. B. 172.

protect the sheriff, as showing that the seizure was made by the authority of the law.[1]

The rule originally was, that where the admission was in the course of a *conversation* in which several distinct matters were discussed, *the whole conversation* was admissible, whether it related to the admission or not;[2] but the unreasonableness as well as injustice of this rule soon became obvious, and now it is held that *only that part of the conversation which explains or qualifies the matter before the court* is admissible.[3] In the case last cited an action was brought for malicious arrest on a false suggestion that money was lent by the defendant to the plaintiff, when in fact it had been given to him. The plaintiff called his attorney as a witness, who happened to be present at the trial of a prosecution for perjury, instituted by the plaintiff against a witness in the action wherein he had been arrested. The defendant's counsel inquired of him, in cross-examination, whether the plaintiff had not, on the trial for perjury, stated that he himself had been insolvent repeatedly and remanded by the court. This question was not objected to. On his re-examination the same witness was asked whether the plaintiff had not also on that occasion given an account of the circumstances out of which the arrest had arisen, and what that account was, for the purpose of laying before the jury proof that the arrest was without cause and malicious. This question, expressly confined to that purpose, was, whether the plaintiff did not say, in the course of his examination, that the money was given and not lent. To this question the defendant's counsel objected, upon the ground that the circumstance of the defendant having proved one detached expression that fell from the plaintiff when a witness, did not make the whole of what he then said evidence in his favor. LORD DENMAN, C. J., at the trial was of opinion that the witness might be asked as to everything said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross examined; *but that*

[1] Bessey *v.* Windham, 6 Q. B. 166.

[2] The Queen's Case, 2 B. & B. 846.

[3] Prince *v.* Samo, 7 Ad. & El. 627.

he had no right to add any independent history of transactions wholly unconnected with it. The court afterwards held that the line had been correctly drawn by his Lordship at the trial.

In this case, the *dictum* of ABBOTT, C. J., in the Queen's Case, just referred to, was cited, and LORD DENMAN, C. J., in giving the judgment of the court, observed, with regard to that *dictum*: "We forbear from entering into a detailed examination of the doctrine there laid down. We have considered it repeatedly with all the diffidence inspired by such an authority, but we cannot assent to it. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords,[1] and may, therefore, be strictly regarded as extra-judicial; that it was not necessary, as a reason for the answer to the question that was proposed; that it was not in terms adopted by LORD ELDON, or any other of the judges who concurred; that it was expressly denied by LORDS REDESDALE and WYNFORD; and that it does not rest on any previous authority. We ought to add that, in our opinion, the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested."

Upon a review, therefore, of the authorities, the correct rule seems to be as follows: That where a statement, forming a part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, *that would in any way qualify or explain that statement*, is also admissible; *but detached and independent statements, in no way connected with the statement given in evidence, are not admissible;* and that there is no difference in this respect between statements made in conversation by a party to the suit, and those made by a third party.

Sec. 161. Weight to be given to Admissions and Declarations.

Admissions or declarations may be very weak as evidence[2]

[1] The question had reference to the re-examination of a witness for the purpose of letting in the whole of what he himself had stated in a conversation. See 2 B. & B. 294, 296, and *supra*.

[2] Dupre *v.* McNight, 6 La. An. 146; Printup *v.* Mitchell, 17 Ga.

or very strong, according to the circumstances under which they were made, and in all cases these circumstances should be carefully scanned.[1] Such admissions are only admissible when parol evidence is admissible to establish the fact.[2] An admission by way of a demurrer to a plea is just as admissible as though admitted *ore tenus* before a jury.[3] It is not essential that the party making the admission should have personal knowledge of the facts admitted. If he believes a fact to be true upon evidence sufficient to convince him of its truth, his statement of such fact, if against his interest, is evidence against him; and though of an unsatisfactory character, it is still competent.[4] They may be sufficient, although they are not conclusive evidence against him,[5] and although they have been drawn from him by a false suggestion,[6] but not where they were made under a misapprehension of his legal rights, where they go to defeat or establish such right.[7]

Representations made by a party to another person, with a view to gain credit or advantage, are admissible in evidence against him, and are conclusive. But such representations are not conclusive against him where there is no breach of good faith in receding from them.[8]

If a party to a suit, whether upon the stand as a witness or otherwise, is shown a paper containing written statements material to the issue and adverse to his interests, and he, after examination, admits that the statements therein contained are true, the paper containing the statements may go to the jury, in connection with his testimony or statements, as the admission of the party, and it makes no difference when, where or by whom the statement was thus written.[9]

558; Horner *v.* Speed, 2 P. & H. (Va.) 616; Vaughn *v.* Haim, 6 B. Mon. (Ky.) 338; The Latty Ole, U. S. Adm. 329; Parker *v.* McNeill, 20 Miss. 355.

[1] Eaton *v.* Welsh, 29 Ga. 443; Wittick *v.* Kiffer, 31 Ala. 199; Fidler *v.* McKinley, 21 Ill. 308; Chandler *v.* Schoonmaker, 14 Ind. 324; Hoper *v.* Evans, 9 Miss. 195.

[2] Bivins *v.* McElroy, 11 Ark. 23; Brooks *v.* Ishell, 22 Ark. 488.

[3] Coffin *v.* Knott, 2 Greene (Iowa), 582.

[4] Sparr *v.* Wellman, 11 Mo. 230; Kitchens *v.* Robbins, 29 Ga. 713.

[5] Cafferatta *v.* Cafferatta, 22 Mo. 235.

[6] Higgins *v.* Dellinger, 22 Mo. 397.

[7] Moore *v.* Hitchcock, 4 Wend. (N. Y.) 292.

[8] Tufts *v.* Hayes, 5 N. H. 452; Scammon *v.* Scammon, 33 N. H. 52.

[9] Rich *v.* Flanders, 39 N. H. 304.

In an action to recover for goods sold, proof of an admission by the buyer of the correctness of the account against him, there being no dispute on the trial as to the amount, is proof of the sale and delivery of the goods.[1]

An admission by one during his tenancy, under whom one of the plaintiff's claim, affects such plaintiff only.[2] By the common law, whenever the act or declaration of a party then interested would be evidence against himself, they will be evidence against his subsequent assignee, or party claiming under him.[3] But the expression of an opinion by one that he is liable for a certain debt is not evidence of his liability.[4] Nor can any presumption of a fact be drawn from it, where the fact is expressly denied.[5] The mere admission of a "debt" is not sufficient to charge the defendant with the whole demand of the plaintiff; but the amount must be proved.[6]

Sec. 162. Where and How a Party may Discredit his Admissions.

A party cannot rebut the evidence of his own admissions by different declarations made at other times,[7] but he may show that they were not true. The declarations of a party that he had promised to a stage line four horses are not evidence sufficient to warrant the inference that he was a joint proprietor, and it is competent to repel all inferences to his prejudice by showing that he actually sold three horses to the agent of the ostensible proprietor of the line.[8]

Although the declarations or admissions of a party are evidence against himself, yet they do not, when offered,

[1] New York Ice Co. *v.* Parker, 8 Bosw. (N. Y.) 683; Griffin *v.* Keith, 1 Hilt. (N. Y.) 58.

[2] Grant *v.* Levan, 4 Penn. St. 393.

[3] Snelgrove *v.* Martin, 2 McCord (S. C.), 241; Ten Eyck *v.* Runk, 26 N. J. L. 513.

[4] Berryhill *v.* McKee, 1 Humph. (Tenn.) 31.

[5] Clarendon *v.* Weston, 16 Vt. 332; Brown *v.* Munger, id. 12; Smith *v.* Jones, 15 Johns. (N. Y.) 229; Ripley *v.* Paige, 12 Vt. 353.

[6] Quarles *v.* Littlepage, 2 H. & M. (Va.) 401; Douglass *v.* Davie, 2 McCord (S. C.), 219; Harrison *v.* McKinney, 2 Bay (S. C.), 412.

[7] Lee *v.* Hamilton, 3 Ala. 529; Hunt *v.* Roylance, 11 Cush. (Mass.) 117; Clark *v.* Huffaher, 26 Mo. 264; Tucker *v.* Frederick, 28 Mo. 574; McPeake *v.* Hutchinson, 5 S. & R. (Penn.) 295; Snowden *v.* Pope, Rice (S. C.) Ch. 174; Davis *v.* Kirksey, 2 Rich. (S. C.) 176; Jones *v.* State, 13 Tex. 168.

[8] Anderson *v.* Snow, 9 Ala. 247.

justify him in introducing proof of his counter-declarations, made at a different time, unless the latter form a part of the *res gestæ*.[1] He may show that he made them jocularly.[2]

The admission of a fact when not under such circumstances as to work an estoppel against the party making it, and when it is shown to have been made by one who could not have known the fact from his own knowledge, is but evidence of the existence of that fact, and may be denied by satisfactory testimony of witnesses who base their evidence upon personal knowledge.[3] A party is at liberty to explain them, or show that he was mistaken, and this, though the admissions were under oath.[4] Or that they were untrue or made under a mistake, unless another has acted, relying on them, so as to estop him.[5] *But a judicial admission, solemnly made, cannot be denied.*[6]

Notwithstanding the admission by the defendants of a judgment as evidence from which the jury might find a verdict for the whole amount of the claims sued on, but not conceding it to be conclusive evidence, it is competent for them to claim any credit to which they might show themselves entitled by proof.[7] Verbal admissions, hastily made without investigation, and in ignorance of material facts of a case, are not binding where the facts to the contrary are unequivocally established.[8]

When a party admits a letter or other document to be genuine by using it as such, he cannot afterwards deny its authenticity when his opponent desires to use it.[9] Where an admission was on the authority of a decision which has been overruled, and was to the prejudice of the party making it, he is held not to be bound by it.[10]

[1] Roberts *v.* Trawick, 22 Ala. 490.

[2] Beebe *v.* De Baan, 8 Ark. 510.

[3] Wynn *v.* Garland, 16 Ark. 440.

[4] Carter *v.* Bennett, 4 Fla. 283; Stewart *v.* Connor, 13 Ala. 94; Houghtaling *v.* Kelderhouse, 1 Park. (N. Y.) Cr. 241.

[5] Ray *v.* Bell, 24 Ill. 444; Young *v.* Foote, 43 Ill. 33; Pecker *v.* Hoit, 15 N. H. 143; Rice *v.* Railroad Bank, 7 Humph. (Tenn.) 39.

[6] Gridley *v.* Connor, 4 La. Ann. 416; Edson *v.* Freret, 11 id. 710.

[7] Matthews *v.* Dare, 20 Md. 248.

[8] Martin *v.* Peters, 4 Robt. (N. Y.) 434.

[9] Robeson *v.* Schuylkill Nav. Co., 3 Grant (Penn.) Cas. 186.

[10] Hays *v.* Cage, 2 Tex. 501.

Evidence that a party is of poor health and subject to depression of spirits is admissible to invalidate his declarations, at such a time, as to his affairs.[1] So it may be shown that the admission was fraudulently or collusively made, and in that event it is not entitled to any weight with the jury.[2]

Sec. 163. Parties to Negotiable Paper generally.

In an action upon a note, the declarations of a nominal plaintiff, *made before he parted with his interest in the note*, are admissible in evidence; and without proof of the time when he parted with his interest, his declarations, made at any time before suit brought, are admissible.[3] This is upon the principle that the admission is made by a privy in estate, but is confined entirely to admissions made while the proprietary interest existed.[4] Thus, a declaration by a testator that certain notes, which are particularly specified, were advancements to one of his children, is against his interest, although the notes were out of date, and is consequently admissible in evidence against the child's representatives.[5] But the declarations of a merchant's clerk, made to a notary public, cannot be admitted in evidence to show who was the holder of a note, unless such declarations were immediately connected with the solemnity of protesting.[6] Nor is the acceptance of security for all notes in which a party may have become liable, evidence that he authorized the signing of his name to notes not particularly specified in the deed, nor identified as having been secured thereby. An admission by a party that he has been fully indemnified means *indemnified against legal liabilities;* and even though he knew at the time that the person from whom he received the security had forged his signature, it is not to be construed as applicable to the forged signature.[7] In an action by an indorsee of a negotiable note, where the plaintiff is shown

[1] Brackett *v.* Wait, 6 Vt. 411.

[2] Ramsbottom *v.* Phelps, 18 Conn. 278.

[3] Sally *v.* Gooden, 5 Ala. 78; Clews *v.* Kehr, 90 N. Y. 633.

[4] Smith *v.* De Ruitz, R. & M. 212; Phillips *v.* Cale, 10 Ad. & El. 106.

[5] West *v.* Bolton, 23 Ga. 531.

[6] Burt *v.* Gwinn, 4 H. & J. (Md.) 507.

[7] Walters *v.* Munroe, 17 Md. 150.

to have received it of the former holder *after it became due*, and he fails to show that he paid value for it, the suit is presumed to be prosecuted for the benefit of the former holder; and his declarations made while he held the note, *and after it became payable*, that it was given upon an illegal consideration, are admissible for the defendant.[1] But evidence of an admission by the defendant that he had given the plaintiff a note of the same amount with the note produced at the trial, which he would pay if time were given him, is not sufficient evidence of the execution of the note produced.[2] Nor in a suit by the holder against the acceptor of a draft payable to a certain person or his order, can the plaintiff prove his own declarations, or the admission of any one who was not a party nor a witness in the cause; nor is the mere receipt of such person, stating the fact that the draft was made for his accommodation, competent testimony. But any evidence given tending to show that a draft was accommodation paper should be submitted to the jury.[3] The declarations of a deceased party to a note are inadmissible, although he might be a witness if living.[4] An acknowledgment made by the maker of a note to one who once held it as indorsee, will inure to the benefit of the holder.[5] Thus, in an action against three joint makers of a promissory note, the admissions of one of the defendants was held competent evidence against his co-defendants, at least until the inferences arising from the face of the note are rebutted, and it is shown that the party making the admissions is not jointly interested with the others.[6] In an action on a due bill by a payee, a paper signed by the plaintiff, admitting that he had not, then or at any time, any interest in the due bill, that it was made payable to him without his knowledge or consent, and that he did not know the owner, and certifying that the maker had informed him that the bill was given for money

[1] Brisbane *v.* Pratt, 4 Den. (N. Y.) 63.

[2] Palmer *v.* Manning, 4 Den. (N. Y.) 131.

[3] Wilt *v.* Snyder, 17 Penn. St. 77.

[4] Duncan *v.* Seaborn, 1 Rice (S. C.), 27.

[5] McRae *v.* Kennon, 1 Ala. 295.

[6] Camp *v.* Dill, 27 Ala. 553; Bound *v.* Lathrop, 4 Conn. 336; Barrick *v.* Austin, 21 Barb. (N. Y.) 241.

lost at cards, is admissible for the defendant as an admission of a party in interest or a trustee or agent binding upon the real owner in the absence of any evidence that he was not the real owner.[1] So in an action upon a note, which matured after the decease of the indorser, against his administrator, it is competent to prove notice by proving the admissions of the administrator, unless the administrator is present and is willing to testify to the point.[2] But an admission by the party liable upon a sealed bill, of a balance due on it, is not an acknowledgment of its execution; and, if it were, would not obviate the necessity of proving that fact by the subscribing witness, or accounting for his absence.[3] But proof that the defendant in an action on a note said, on being shown the note, that "it was right," and he would not object to "its coming in on the trial," is sufficient to authorize the admission of the note in evidence.[4]

Where the defense to an action upon an assigned note is, that the defendant was a mere accommodation drawer, an account, which had been exhibited by the party in interest on another trial between himself and others, explaining the origin of the note, and admissions made by him at the same trial, are proper evidence for the jury; but not his attorney's letters relative to this previous trial.[5] Nor are the declarations of the maker of a note given for an old one at the time of making the note, admissible to affect his legal liability on the note; but they are admissible to show whether the new note is entirely a new contract, or an extension of the old one.[6] It is not conclusive against the maker of a note that he has acknowledged that the signature to it was his.[7] The admissions of the maker are not admissible against an indorser, even though he indorsed the note at its inception as promisor.[8] Nor are the admissions of the maker of a note admissible in an action by the payee against the surety when

[1] Hogan *v.* Sherman, 5 Mich. 60.

[2] Duncan *v.* Watson, 10 Miss. 121.

[3] Hogland *v.* Sebring, 4 N. J. L. 105.

[4] Suydam *v.* Combs, 15 N. J. L. 133.

[5] Iglehart *v.* Jernegan, 16 Ill. 513.

[6] Nutter *v.* Stover, 48 Me. 163.

[7] Hall *v.* Huse, 10 Mass. 39; Salem Bank *v.* Gloucester Bank, 17 id. 1.

[8] Baker *v.* Briggs, 8 Pick. (Mass.) 122.

such admissions were made in the absence of the surety.[1] In an action by the pawnor of a note more than six years old, to recover damages of the pawnee for not returning it after the debt for which it was pledged was paid, the defendant cannot give in evidence the declaration of the maker that nothing was due thereon to the plaintiff.[2]

Where evidence has been introduced to show that a note was one of several given by a person since deceased, in pursuance of a general design to settle his estate, declarations of the maker in relation to the consideration of such notes made a few days after they were given, are incompetent.[3] Nor in an action against one of several joint makers are the statements of another of the makers admissible as evidence for the defendant, when objected to by the plaintiff.[4] But although a general partnership between two is not established by the admission of one of the alleged partners, yet where two are sued, as co-promisors, upon a note signed by one, and there is proof of an admission of liability by the other, such admission is evidence that the signing party was the agent to make the promise.[5]

Where one of two defendants, sued jointly on a note, pleads and proves his discharge in bankruptcy, evidence of his admissions and declarations, made while he was in fact insolvent, but before he obtained his discharge, is admissible, notwithstanding he may be the principal on the note, and the other defendant the surety.[6]

Admissions made by the payee of a note, through whom the plaintiff derives title as indorsee, are not evidence to charge the maker, although his admission made on a previous day, in discharge of the maker, had been given in evidence by the latter; the latter admissions not being made in the same conversation.[7]

In an action brought in the name of the payee of a prom-

[1] Dexter *v.* Clemens, 17 Pick. (Mass.) 175.

[2] Thomas *v.* Waterman, 7 Met. (Mass.) 227.

[3] Hubbard *v.* Barker, 1 Allen (Mass.), 99.

[4] Nye *v.* Grubbs, 16 Miss. 643.

[5] Painter *v.* Austin, 37 Penn. St. 458.

[6] Brown *v.* Munger, 16 Vt. 12.

[7] Perry *v.* Graves, 12 Ala. 246. See also Russell *v.* Doyle, 15 Me. 112; Clark *v.* Peabody, 21 id. 500

issory note not negotiable, for the benefit of the assignee, against the maker, the declarations of the payee, made after the assignment, and notice thereof to the maker, are not admissible in favor of the defendant.[1] Nor in a suit by the assignee of the payee of a promissory note can the defendant give evidence of declarations made by the payee, after his assignment, prejudicial to the interests of the plaintiff.[2] Nor in the case of commercial paper, negotiated before due, are the admissions of the payee admissible to impeach the consideration.[3] But declarations by the payee of a note, executed by a married woman and transferred before maturity, that he had taken it for her husband's debt, are admissible against the indorsee.[4]

Admissions made by the payee of a negotiable note, *made while he retains it in his possession*, are admissible, although he may previously have written thereon his indorsement to a third person, in whose name the action is brought.[5] So, in an action by an indorsee against the maker of a note transferred when overdue, the declarations of the indorsee may be given in evidence by the maker; but if he elects to call him as a witness, he waives his right to give his declaration in evidence.[6] Declarations by the payee of a promissory note to the attesting witness, at the time of his attestation, but in the absence of the maker, are not admissible against the maker to explain the payee's motive in wishing to have it attested.[7] But declarations made by the payee of a note while he was the owner are not admissible to affect one to whom he subsequently transfers it.[8] Thus, in a suit by a bank against the payee and indorser and an accommodation indorser of a promissory note, the dispute being as to the object of the note, and for what liabilities it was intended as

[1] Scripture *v.* Newcomb, 16 Conn. 588.

[2] Fleming *v.* Newman, 5 Blackf. (Ind.) 220.

[3] Stoner *v.* Ellis, 6 Ind. 152.

[4] Pilcher *v.* Kerr, 7 La. Ann. 144.

[5] Whitier *v.* Vose, 16 Me. 403.

[6] Merrick *v.* Parkman, 18 Me. 407.

[7] Lincoln *v.* Lincoln, 12 Gray (Mass.), 45.

[8] Beach *v.* Wise, 1 Hill (N. Y.), 612; Paige *v.* Cagwin, 7 id. 361; Osborn *v.* Robbins, 37 Barb. (N.Y.) 481; Crayton *v.* Collins, 2 M'Cord (S. C.), 457; Washburn *v.* Ramsdell, 17 Vt. 299.

collateral, admissions made by the former are not admissible as against the latter.[1] But in an action upon a note, where the signature is denied, the defendant may show the declarations of the plaintiff on the occasion of taking the note, and then prove such declarations to be false.[2]

Where a promissory note becomes the property of one not a party to it and this is known to the maker, and the holder commences an action upon the note in the name of the payee, the maker cannot give in evidence admissions made by the payee subsequent to the commencement of the suit.[3]

Sec. 164. Admissions by an Indorser.

An admission by an indorser that he indorsed a draft drawn by the defendant, for a certain sum, at a certain time, the sum and time corresponding with the draft in suit, is *prima facie* sufficient, in an action against him thereon, to establish the fact that he indorsed the draft in suit.[4] So the insolvency of the maker of a note may be established, in an action against the indorser, by the latter's admissions to that effect.[5] The admission of an indorser after a note is overdue, made to an indorsee, that he knew that no demand had been made upon the maker, and a promise made by him to pay the note notwithstanding such omission, is admissible in favor of a subsequent indorsee, in an action brought by him against the indorser.[6] In an action by the indorser of a dishonored bill against the acceptor, admissions made by the indorser while he owned the bill are admissible in favor of the acceptor.[7] But admissions made by the indorser of a note or bill which are not known to the indorsee cannot be used in evidence against him.[8] The declaration of an indorser that the maker told him that payment had been duly demanded of him is not admissible to establish the fact of demand and notice;[9] nor are his admissions affecting the

[1] Highland Bank *v.* Wynkoop, Hill & D. Supp. (N. Y.) 243.

[2] Depue *v.* Place, 7 Penn. St. 428.

[3] Hough *v.* Barton, 20 Vt. 455.

[4] Hyer *v.* Smith, 3 Cranch (U. S. C. C.), 437.

[5] Raplee *v.* Morgan, 3 Ill. 561.

[6] Rogers *v.* Hackett, 21 N. H. 100.

[7] Shirley *v.* Ladd, 9 Me. 83.

[8] Blancjour *v.* Tutt, 32 Mo. 576.

[9] Tamer *v.* Dunell, 9 Mass. 332.

validity of the note admissible, although it is shown that he still retains an interest in the note.[1] But the admissions of an indorser or assignor of a note, *made at a time when he had an interest and right of action therein*, are admissible.[2] But admissions made by him *after* his interest in the note has ceased are not admissible, as this would place it within the power of a person to defeat the rights of another by a mere naked statement, without the sanctity or responsibilities of an oath.[3]

Sec. 165. Admissions made by a Former Owner of a Note.

Admissions made by the holder of a note, before it was due and before indorsement, and which was negotiated before it was due, are not admissible against the indorser,[4] unless he had express notice of the defects to which the admission relates at the time when it was indorsed to him.[5] But when the note was overdue at the time of its indorsement, declarations of a prior holder, *made while he held the note, after it was due*, are admissible in evidence to show payment to such prior holder or any right of set-off which the maker had against him. But such declarations made by the holder before he took the note are inadmissible. So such declarations made by the holder after assigning the note to one from whom the plaintiff since took it are inadmissible, unless the assignment was conditioned to be void upon the payment to the assignor of a less sum than the amount due on the note, in which case the declarations are admissible in evidence for the defendant to the extent of the interest remaining in the prior holder.[6]

As a general rule, admissions made by a person after he has parted with his interest in a bond, note or other security, cannot be given in evidence in prejudice of the assignee.[7]

[1] Butler *v.* Damon, 15 Mass. 223.

[2] Abbott *v.* Muir, 5 Ind. 444; Williams *v.* Judy, 8 Ill. 282.

[3] Lester *v.* Baker, 6 Blackf. (Ind.) 439; Porter *v.* Rea, 6 Mo. 48; Bartlett *v.* Marshall, 2 Bibb (Ky.), 467; Matthews *v.* Houghton, 10 Me. 420.

[4] Drumond *v.* Smith, 3 Head. (Tenn.) 389.

[5] Glunton *v.* Griggs, 5 Ga. 424.

[6] Bond *v.* Fitzpatrick, 4 Gray (Mass.), 89.

[7] Cleveland *v.* Davis, 3 Mo. 331; Smith *v.* Shank, 18 Barb. (N. Y.) 344.

But declarations of a former holder of a bill *transferred to the plaintiff after dishonor*, are competent to show that before such transfer the defendants were discharged from liability.[1] Although it is generally true that the declarations of a former holder of a bill, made while it was in his hands, are not admissible against a party who took it *bona fide*, in the course of business, before it became due, yet *where the defense, in an action by the indorsee against the acceptor of a bill, is that the acceptance was procured by fraud, and was without consideration*, and in support of this defense the defendant offered in evidence the declarations of a former holder of the bill, since dead, made while it was in his hands, it was held that such declarations were admissible for that purpose, but not to affect the plaintiff, unless such holder, from whom the plaintiff received it, had knowledge of the fraud at the time he took it.[2]

In an action by the payee against the drawer of a bill not accepted, the declarations of the drawee, made at the time of presenting the bill, that he had no funds of the drawer in his hands, are not admissible in evidence; the drawee, in such case, not being the agent of the drawer.[3] But the declarations of the payee of a negotiable note, *made while he retains it in his possession*, are admissible, although he may previously have written thereon his indorsement to a third person, in whose name the action is brought.[4] So, in an action by an indorsee against the maker of a note transferred when overdue, the declarations of the indorsee may be given in evidence by the maker; but if he elects to call him as a witness, he thereby waives his right to give his declaration in evidence.[5] But in the case of commercial paper, *negotiated before due*, the declarations of the payee are inadmissible to impeach the consideration.[6] But declarations by the payee of a note, executed by a married woman, and transferred before maturity, that he had taken it for her husband's debt, are admissible against the indorsee.[7]

[1] Hollister *v.* Reznor, 9 Ohio, 1.
[2] Roe *v.* Jerome, 18 Conn. 138.
[3] Carle *v.* White, 9 Me. 104.
[4] Whitier *v.* Vose, 16 Me. 403.
[5] Merrick *v.* Parkman, 31 Me. 407.
[6] Stoner *v.* Ellis, 6 Ind. 152.
[7] Pilcher *v.* Kerr, 7 La. Ann. 144.

In an action brought in the name of the payee of a promissory note not negotiable, for the benefit of the assignee, against the maker, the declarations of the payee, *made after the assignment, and notice thereof to the maker*, are not admissible in favor of the defendant.[1] Nor in a suit by the assignee of the payee of a promissory note can the defendant give evidence of declarations made by the payee, *after his assignment*, prejudicial to the interests of the plaintiff.[2]

In an action of debt against A. and B. on a promissory note, alleged in the declaration to have been made by the defendants, A. made default, and B. pleaded *nil debet* under oath. It was held on the trial of the issue with B. that the plaintiff might prove the partnership of the defendants at the date of the note, and A.'s subsequent admissions respecting the execution of the note.[3] But where A., an indorser of a sealed note, indorsed it in blank to B., who delivered it to C. without indorsement, and C. in like manner sold it to D., and D., having written over A.'s name an indorsement to himself, sued A. as indorser, it was held that B. was a competent witness for A.; and that consequently his declarations, while he held the note, as to the amount he paid for it, were inadmissible.[4]

It is competent to show by the admissions of a party that a debt owed by him has not been paid. Thus the principal obligor in a bond to the United States gave to the collector who took the bond a draft of the amount. Suit was brought on the bond in the United States court, and on the draft, in the name of the collector, in a State court, and it was agreed that judgment by default should be entered on the bond, and that no other further proceedings should be had on the draft. Judgment on the bond remained unsatisfied, and the collector, who had paid the amount to the United States, brought another action on the draft. It was held that the plaintiff might repel any presumption, arising from such agreement, that the draft had been paid or canceled, by proof that the

[1] Scripture *v.* Newcomb, 16 Conn. 588.

[2] Fleming *v.* Newman, 5 Blackf. (Ind.) 220.

[3] Ensminger *v.* Marvin, 5 Blackf. (Ind.) 210.

[4] Lynn *v.* Jeter, 7 Blackf. (Ind.) 300.

defendant had afterwards admitted that the draft was justly due and unpaid.[1]

Where a note, payable on demand, was indorsed and transferred by the payee, it was held that the declarations of the indorser, prior to the indorsement of the note, and in reference to it, were admissible for the purpose of showing that he was to be liable without demand or notice, and especially is this the case when the admissions are connected with subsequent conduct and declarations having the same tendency.[2] The consideration or validity of a note-bill, upon any ground, may be attacked by admissions made by the owner thereof at any time while he was owner, and after the note was due. Thus the payee of a note, payable to himself or bearer, stated, on the day after its date, and while he held it in his possession, that he had sold it, but that he had won the amount from the maker at faro, and in an action by the bearer of the note it was held that the declarations of the payee were admissible to show that the note was given for a gaming consideration.[3] But if the note was not due, and was subsequently negotiated *before it became due*, such admissions cannot be received to defeat the note, because to admit them would operate unjustly upon an innocent purchaser, and would destroy the value of commercial paper. Thus B., having possession of a promissory note, payable to H. or bearer, transferred it, before due, to D., and, by writing on the back of the note, guaranteed its payment. B. being dead, in a suit by D. against the drawer it was held that B.'s declarations, made after the transfer, were inadmissible in behalf of the defendant to invalidate the note, by showing that it was given for a gaming consideration.[4]

In an action by the indorsee against the maker of a promissory note, which was sold by the payee at a rate exceeding the legal rate of interest, evidence of the declarations of the payee, who was dead, that the note was an accommodation note, lent to him by the maker, is not admissible.[5]

[1] M'Cobb *v.* Healy, 17 Me. 158.
[2] Fullerton *v.* Rundlett, 27 Me. 21.
[3] Sharp *v.* Smith, 7 Rich. (S. C.) 3.
[4] De Bruhl *v.* Patterson, 12 Rich. (S. C.) 363.
[5] Kent *v.* Walton, 7 Wend. (N. Y.) 256.

The payee of a note, after it was duly made and delivered, gave it to the maker to keep until certain acts, to be done by the maker, were performed, and the maker subsequently refused to redeliver it to the payee. It was held, in an action on the note by the payee, that the circumstances under which the note came to the possession of the maker might be given in evidence by him.[1]

The indorser of a note, before taking it, sent a messenger to the maker, with instructions to inquire if it were a business note. The answer was returned that it was. It was held, in a suit on a note to which the defense set up was that it was an accommodation note, that the foregoing facts having been proved, evidence might properly be admitted, coming from any person who made the declaration, that the messenger on his return stated this answer to the indorsee.[2]

The mere oral declaration of a deceased maker of a note, made during his last illness, "that the note, though nominally payable to A., was really for the benefit of B.," is admissible to show that the note, in fact, was the property of B.[3]

Sec. 166. Admissions of Persons Acting together Illegally.

Where two or more persons are associated for the same illegal purpose, an act or declaration of one of the parties in reference to the common object, and forming part of the *res gestæ*, may be given in evidence against the other.[4] Thus, on an indictment against one of several who made a

[1] Garlock *v.* Geortner, id. 198.

[2] Robbins *v.* Richardson, 2 Bosw. (N. Y.) 248.

[3] Morei.i *v.* Solomons, 7 Rich. (S. C.) 97.

[4] American Fur Co. *v.* United States, 2 Pet. (U. S.) 358; Lincoln *v.* Claflin, 7 Wall. 132; Stewart *v.* State, 26 Ala. 44; Johnson *v.* State, 29 Ala. 62; Glory *v.* State, 13 Ark. 236; Clinton *v.* Estes, 20 id. 216; State *v.* Ross, 29 Mo. 32; State *v.* Nash, 7 Iowa, 347; Colt *v.* Eves, 12 Conn. 243; State *v.* Grady, 34 id. 118; State *v.* Myers, 19 Iowa, 517; Oldham *v.* Bentley, 6 B. Mon. (Ky.) 428; State *v.* Hogan, 3 La. Ann. 714; State *v.* Havelin, 6 id. 167; State *v.* Soper, 16 Me. 293; Aldrich *v.* Warren, id. 465; Commonwealth *v.* Turion, 8 Gray (Mass.), 375; Commonwealth *v.* Brown, 14 id. 419; People *v.* Pitcher, 15 Mich. 397; Mask *v.* State, 32 Miss. 405; Moers *v.* Martin, 8 Abb. (N. Y.) Pr. 257; 17 How. Pr. 280; Patton *v.* Ohio, 6 Ohio St. 467; Fonts *v.* State, 7 id. 471; Preston *v.* Bowers, 13 id. 1; State *v.* Thibeau, 30 Vt. 100.

joint assault, the acts of the other may be given in evidence.[1] The rule may be said to be that, when there is a community of interest and design, the admissions or statements of any of the parties relating to the common object are admissible either in civil or criminal proceedings.[2] Thus, where several persons jointly attempt to perpetrate a fraud, the declarations of one of them, made during the progress and in the prosecution of the joint undertaking, or explaining acts done in furtherance of it, are admissible against the others.[3] But before such declarations of a person not a party to the action can be admitted, the common purpose, and his connection therewith, and the common unlawful design, must be shown; and evidence which is merely admissible upon the question of the common illegal purpose, but is insufficient to establish the fact, is not sufficient to make such declarations admissible, and, for this purpose, the question whether such common and unlawful design has been established is for the court.[4] In the case of conspiracy, proof of a division of the profits of the fraudulent enterprise is sufficient evidence of a combination to let in the evidence of one conspirator against the rest.[5] But admissions by one made after the undertaking is completed are not admissible against the others,[6] nor after the death of the person making the admission.[7]

Sec. 167. Admissions by Co-plaintiffs or Co-defendants.

The better rule seems to be that the admission of one plaintiff in an action is not admissible against his co-plaintiffs *unless their interest in the subject-matter of the action is*

[1] United States *v.* Johnston, 1 Cranch (U. S. C. C.), 237.

[2] Clayton *v.* Anthony, 6 Rand. (Va.) 285; Snyder *v.* Laframoise, 1 Ill. 268.

[3] Jenne *v.* Joslyn, 41 Vt. 478; Lee *v.* Lamprey, 43 N. H. 13; Peterson *v.* Speer, 29 Penn. St. 479; Patton *v.* Freeman, 1 N. J. L. 113; Anthorp *v.* Comstock, 2 Paige Ch. (N. Y.) 482.

[4] Jones *v.* Hurlburt, 39 Barb. (N. Y.) 403; Burke *v.* Miller, 7 Cush. (Mass.) 547.

[5] Kimmel *v.* Geeting, 2 Grant's Cas. (Penn.) 125; Kelsey *v.* Murphy, 26 Penn. St. 78.

[6] Clinton *v.* Estes, 20 Ark. 216; Lynes *v.* State, 36 Miss. 617; Benford *v.* Sanner, 56 Penn. St. 336; Hunter *v.* Com., 7 Gratt. (Va.) 641.

[7] Gaunce *v.* Backhouse, 37 Penn. St. 350.

joint.[1] Nor can the admission of a merely nominal plaintiff, *made after the action was brought*, be given in evidence to defeat the action.[2] And the same rule prevails as to co-defendants,[3] and the admission of one is evidence against the other when they are sued upon a joint contract.[4] But where the contract is several, and one of two persons liable thereon is sued alone, admissions made by the other are not admissible.[5] In actions of tort, as in trover, the admission of one defendant is admissible against him, but not against the other,[6] although the other defendant should generally ask the court to direct the jury not to consider the evidence as affecting him, or it will not furnish a ground for a new trial.[7]

Sec. 168. Admission of One of Two or more Persons United in Interest.

An admission of one of two or more persons who were at the time of the admission *jointly interested in the subject-matter to which the admission relates*, is admissible against the others.[8] Thus, after *prima facie* evidence of a partner-

[1] Baswell *v.* Blackman, 12 Ga. 591; Raton *v.* Nichols, 22 Ark. 244; Barnum *v.* Hackett, 35 Vt. 77; Juby *v.* Brigham, 9 Humph. (Tenn.) 750; Armstrong *v.* Farrar, 8 Mo. 627; Hurst *v.* Robinson, 18 Mo. 82. The admission of a legatee under a will, as to the mental capacity of the testator, is not admissible against the others. Thompson *v.* Thompson, 13 Ohio St. 356; Irwin *v.* West, 31 Penn. St. 157.

[2] Sargeant *v.* Sargeant, 18 Vt. 371; Chrisholm *v.* Newton, 1 Ala. 371; Sykes *v.* Lewis, 17 Ala. 241; Mayer *v.* Inman, 2 Swan (Tenn.), 80; Dazy *v.* Mills, 10 Ill. 67; Brown *v.* Foster, 4 Ala. 282.

[3] Lenhart *v.* Allen, 32 Penn. St. 312; Burnham *v.* Sweatt, 16 N. H. 418; Walling *v.* Roosevelt, 16 N. J. L. 41; Quinlan *v.* Davis, 6 Wheat. (Penn.) 169.

[4] Martin *v.* Root, 17 Mass. 222.

[5] Baker *v.* Briggs, 8 Pick. (Mass.) 122.

[6] Edgerton *v.* Wolf, 6 Gray (Mass.), 453; Hodges *v.* Hodges, 2 Cush. (Mass.) 455.

[7] Hubbell *v.* Bissell, 2 Allen (Mass.), 196; Williams *v.* Taunton, 125 Mass. 34.

[8] Bakeney *v.* Ferguson, 14 Ark. 641; Barnwell *v.* Blackman, 12 Ga. 591; Oviatt *v.* Sage, 7 Conn. 95; Reagan *v.* Green, 13 Penn. St. 508. We have always regarded this rule as unsound and not sustainable upon principle. In the case of partners there is not only a joint interest, but each partner in the business of the partnership is an agent for the others, so that his admissions very properly are held to be binding upon all. But in the case of joint ownership or interest, where no partnership exists, neither owner is an agent for the other, and there seems to be no reason, therefore, why the admission of one should bind the other, and the rule to that effect in New York seems to best

ship has been given, the admission of one of the partners is admissible against the others,[1] although the partner making the admission is not a party to the suit.[2] But the admission must be made while the partnership still exists; if made *after its dissolution*, it is not admissible against the others,[3] unless, perhaps, to prove payment of a debt due to the firm.[4] The fact that it is against interest must be established, and the admission of one of two or more owners of land or personal property are not admissible against the other, because their interests are not joint, but several.[5] Thus, the admission of one of several owners of a vessel is not admissible against the others,[6] nor are the admissions of one tenant in common admissible against the other,[7] nor is the admission of a life tenant admissible against a person claiming by title paramount;[8] but the admission of one joint tenant is admissible against the other.[9] In order to make such an admission admissible against the other joint owners, according to the English cases, the parties must have a joint interest in the decision.[10]

Sec. 169. Admissions by Husband or Wife.

A husband can be charged by the contract or admission of his wife only in consequence of some authority actually given, or necessarily implied from the circumstances under which she acts. But the circumstances under which the plaintiff's property went into possession of a defendant ad-

accord with principle. Lewis *v.* Woodworth, 2 N. Y. 512; Whitcomb *v.* Whitney, 2 Doug. 652; Vicary's Case, Gil. Ev. 51.

[1] Nicholls *v.* Dawding, 1 Starkie, 81. But judge must first determine whether there is *prima facie* evidence of a partnership. Hilton *v.* McDowell, 87 N. C. 364.

[2] Wood *v.* Braddick, 1 Starkie, 81. But this is denied in Rooth *v.* Quin, 7 Price, 198.

[3] Watson *v.* Woodman, L. R. 20 Eq. 721.

[4] Pritchard *v.* Draper, 1 R. & My. 191.

[5] The New Orleans, 106 U. S. 13.

[6] McMillan *v.* Cox, 36 Me. 95; Page *v.* Swanton, 39 id. 400; The New Orleans, 106 U. S. 13. Unless they navigate the vessel together; Blackstock *v.* Leidy, 16 Penn. St. 335.

[7] Dan *v.* Brown, 4 Cow. (N. Y.) 483.

[8] Hitt *v.* Roderick, 4 W. & S. (Penn.) 221.

[9] Moore *v.* Pearson, 6 W. & S. (Penn.) 51.

[10] Vicary's Case, Gilb. Ev. 61; Le Blanc, J., in 11 East, 581.

ministratrix may be shown in detinue, by proving a request from the defendant to the plaintiff to that effect in the lifetime of her husband.[1] But as the wife may act as the agent of the husband, declarations or admissions made by her while so acting, either under express or implied authority, are admissible against the husband.[2] Admissions made by the wife are admissible against her in an action brought by her in her own name.[3] So they are admissible where she is joined with her husband as a party to the suit.[4] So her admissions are competent evidence when her trustees sue or are sued on her account.[5] But not if the husband is the hostile party.[6] Her admissions are not admissible for the husband except where they form a part of the *res gestæ*.[7] But in many of the states the legal status of the wife is extended by statute, and she is invested with the right to sue and be sued, and may testify for or against her husband, and under such statutes her admissions would be evidence where they would not be at the common law.

The *admissions of the wife*, as a rule, will *bind* the husband only where she had authority to make them.[8] This authority does not result, by mere operation of law, from the relation of husband and wife, *but is a question of fact, to be found by the jury, as in other cases of agency;*

[1] Rochelle *v.* Harrison, 8 Port. (Ala.) 351. But, as stated, except where an agency is established, the admissions of the wife cannot bind the husband or be used against him. Queener *v.* Morrow, 1 Cald. (Tenn.) 123; Logan *v.* Link, 4 E. D. S. (N. Y. C. P.) 63; Lay Grae *v.* Peterson, 3 Sandf. (N. Y.) 338; Walls *v.* Capped, 15 Mo. 448. In Kimball *v.* Currier, 5 Gray (Mass.), 458, it was held that the declarations of a wife as to the state of her husband's mind at the time he executed a certain paper cannot be shown in an action in which the validity of such paper is involved.

[2] Riley *v.* Suydam, 4 Barb. (N. Y.) 222.

[3] Morrell *v.* Crowley, 17 Abb. Pr. (N. Y.) 76.

[4] Pook *v.* Hopkins, 2 Bailey (S. C.), 408.

[5] Hanson *v.* Parker, 1 Wils. 257; May *v.* Taylor, 6 M. & G. 266.

[6] Taylor on Ev., § 543. But this rule is varied essentially by statutes relating to married women in some of the States.

[7] Walton *v.* Green, 1 Cr. P. 621.

[8] Emerson *v.* Blonden, 1 Esp. 142; Anderson *v.* Sanderson, 2 Stark. 204; Carey *v.* Adkins, 4 Camp. 92; Meredith *v.* Footner, 11 M. & W. 202.

for though this relation is peculiar in its circumstances, from its close intimacy and its very nature, yet there is nothing peculiar in the principles of law which apply to it. As the wife is seldom expressly constituted the agent of the husband, the cases on this subject are almost universally those of implied authority, turning upon the degree in which the husband permitted the wife to participate, either in the transaction of his affairs in general, or in the particular matter in question. Where he sues for her wages, the mere fact that she earned them does not authorize her to bind him by her admissions of payment;[1] nor can her unauthorized declarations affect him, even where he sues with her in her right; for in these and similar cases the right is his own, though acquired through her instrumentality.[2] In regard to the inference of her agency from circumstances, the question was formerly left to the jury with great latitude, both as to the fact of agency and the time of the admissions. Thus, it has been held competent for them to infer authority in her to accept a notice and direction in regard to a particular transaction in her husband's trade, from the circumstance of her being seen twice in his counting-room, appearing to conduct his business relating to that transaction, and once giving orders to the foreman.[3] And in an action against the husband for goods furnished to the wife while in the country, where he occasionally visited her, her letter to the plaintiff, admitting the debt and apologizing for the non-payment, though written several years after the transaction, was held sufficient to take the case out of the Statute of Limitations.[4] But this would not now be held; greater strictness has prevailed. In an English case,[5] where a wife, by her husband's

[1] Hall *v.* Hill, 2 Str. 1094; Taylor on Ev. 511, 512.

[2] Alban *v.* Pritchett, 6 T. R. 680; Kelly *v.* Small, 2 Esp. 716; Denn *v.* White, 7 T. R. 112, as to her admission of a trespass. Neither are his admissions as to facts respecting her property, which happened before the marriage, receivable, after his death, to affect the rights of the surviving wife. Smith *v.* Scudder, 11 S. & R. (Penn.) 325.

[3] Plimmer *v.* Sells, 3 N. & M. 422.

[4] Gregory *v.* Parker, 1 Camp. 394; Palethorp *v.* Furnish, 2 Esp. 511, n.; Clifford *v.* Burton, 1 Bing. 199; 8 Moore, 16, S. C.; Petty *v.* Anderson, 3 Bing. 170; Cotes *v.* Davis, 1 Camp. 485.

[5] Meredith *v.* Footner, 11 M. & W. 202.

authority, carried on the business of a shop, and attended to all the receipts and payments, the court held that admissions made by her to the landlord of the shop respecting the amount of rent were not admissible to bind the husband. Had the admissions related to the receipt of shop goods, they would have been evidence; but the fact that she was conducting a business for her husband did not constitute her his agent to make admissions of an antecedent contract for the hire of the shop, or to make a new contract for the future occupation of it.

In an action for damages for an assault and battery by the wife of the defendant upon the wife of the plaintiff, the admissions of the wife of the defendant are not admissible in evidence to charge her husband.[1] And when husband and wife sue jointly for services rendered by the wife during coverture, her admissions of payment cannot be received in evidence against them.[2]

Declarations of a husband that he sold a note belonging to the separate estate of his wife are not admissible in evidence after his death, against the wife, in an action brought by her against the holder of the note, for its conversion.[3] But the admissions of a married woman are competent evidence in an action by her trustee, suing for her use, in favor of the defendant.[4]

In an action against a husband and wife for trespass committed by the wife on the plaintiff, the admissions or declarations of neither of them can be introduced by the plaintiff to prove the trespass.[5] But in an action for a homestead, the declarations of the alleged wife are competent to prove that the plaintiffs are not married.[6]

Upon the contest of a will, evidence of what the widow of the deceased had said in relation to his insanity is inadmissible.[7]

[1] Hussey *v.* Elroyd, 2 Ala. 339.

[2] Jordan *v.* Hubbard, 26 Ala. 433.

[3] Murphree *v.* Singleton, 27 Ala. 412.

[4] McLemore *v.* Nuckolls, 1 Ala. Sel. Cas. 591.

[5] Funkhouser *v.* Pogue, 13 Ark. 295; Burnett *v.* Burkhead, 21 Ark. 77.

[6] Poole *v.* Gerrard, 9 Cal. 593.

[7] Cook *v.* Osborn, 2 Root (Conn.), 31.

In a suit brought by husband and wife jointly, *jure uxoris*, declarations made by her, not in his presence, are not evidence.[1] But the declarations of the plaintiff's husband that money to be paid by the defendant for premises in the husband's possession belonged to the plaintiff, and that he wished the contract to inure to her benefit, are admissible in evidence for the plaintiff, in an action brought to enforce the contract after her husband's death.[2]

If, pending a suit against husband and wife, the husband dies, and the suit proceeds against the wife alone, her admissions of the debt, made during coverture, are evidence against her. So in a suit against husband and wife for a debt contracted by the wife while sole, the admissions of the latter, made during coverture, are not admissible evidence.[3]

A husband's admissions are incompetent to prove him an agent for his wife, in matters concerning her separate property.[4]

Where the surviving wife sues to annul a sale by her and her husband to defendant, as a party interposed in a disguised donation to her husband, his and her declarations, though out of the defendant's presence, are admissible against him as part of the *res gestæ*.[5] But in a real action by husband and wife, to recover possession of land claimed in her right, evidence of the wife's declarations, made during coverture, has been held not to be admissible for the defendant.[6] But where the subscribing witnesses have been called and failed to show that a deed was executed by a wife, whereby she relinquishes her right of dower, the admissions of the wife, made during her widowhood, of her having executed the deed, are admissible as the next best evidence.[7] So, on the issue whether certain money belonged to plaintiff or to her late husband, testimony that she had

[1] Turner *v.* Coe, 5 Conn. 93.

[2] Crain *v.* Wright, 46 Ill. 107.

[3] Lasselle *v.* Brown, 8 Blackf. (Ind.) 221.

[4] Whitescarver *v.* Bonney, 9 Iowa, 480.

[5] Thibodeaux *v.* Herpin, 6 La. Ann. 675.

[6] White *v.* Holman, 12 Me. 157.

[7] Frost *v.* Deering, 21 Me. 156.

no property at the time of his death, or for a year or two previous, may be rebutted by proof of his declarations to the contrary within that period.[1]

Evidence of declarations made by a husband, during coverture, is not admissible against his creditors to establish a secret parol agreement between him and the wife, in reference to property standing in the husband's name during his life-time.[2]

Admissions and declarations of the wife, made both before and after marriage, of the making and execution of a parol antenuptial agreement, by which the husband was to have her *choses in action*, and pay her the interest thereon for pin-money, are admissible in favor of the husband's representatives, against those of the wife who seek to get possession of the bonds and notes of the wife, which have been delivered to the husband pursuant to such agreement.[3]

Upon a joint indictment of husband and wife, the declarations of the wife, though criminating both, are admissible in evidence against her, but not against him.[4]

Sec. 170. Admissions of Attorneys.

The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause. In some cases they are conclusive, and may even be given in evidence upon a new trial, although, previously to such trial, the party gives notice that he intends to withdraw them, or though the pleadings are altered, provided the alterations do not relate to the admissions.[5] But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial.[6]

Another class of admissions comprehends those which

[1] Linscott *v.* Trask, 38 Me. 188.

[2] Brooks *v.* Dent, 1 Md. Ch. 523.

[3] Crane *v.* Gough, 4 Md. 316.

[4] Com. *v.* Briggs, 5 Pick. (Mass.) 429.

[5] Elton *v.* Larkins, 5 C. & P. 385; Doe *v.* Bird, 7 C. & P. 6; Langley *v.* E. of Oxford, 1 M. & W. 508.

[6] See cases cited in last note. Also Young *v.* Wright, 1 Camp. 141, *per* LORD ELLENBOROUGH.

attorneys make, not with the express intent of dispensing with proof of certain facts, but *incidentally*, while they are referring to other matters connected with the cause. These, which are generally the result of carelessness, though not regarded as conclusive admissions, are still considered, not unfrequently, as raising an inference respecting the existence of facts which the adversary would otherwise have been called upon to prove; and consequently it is very important that attorneys should exercise great caution in the language they employ while corresponding with their opponents. Thus, where, in an action against the acceptor of a bill, his attorney had served notice on the plaintiff to produce all papers relating to a bill, the description of which corresponded with that set forth in the declaration,— "which said bill," the notice went on to state, "*was accepted by the said defendant*," — the court held that such notice was *prima facie* evidence of the defendant's acceptance;[1] and in an action against the owners of a ship, their joint ownership was inferred from an undertaking to appear for them, signed by their attorney, in which they were described as owners of the sloop in question.[2] Again, where the defendant's attorney, in an action of debt on a bond, had admitted the signature of the attesting witness, this was held, by implication, to amount to an admission of the due execution of the instrument.[3]

Admissions, however, contained in the *mere conversation* of an attorney, cannot be received against the client, although they relate to the facts in controversy. The reason of this distinction is found in the nature and extent of the authority given, the attorney being constituted for the management of the cause in court, and for nothing more.[4] So, if a letter, sent by an attorney to the opposite party, is expressed to be written "*without prejudice*," it cannot be received as an admission; neither can the reply be admitted, though not

[1] Holt *v.* Squire, Ry. & M. 282.

[2] Marshall *v.* Cliff, 4 Camp. 133.

[3] Milward *v.* Temple, 1 Camp. 375.

[4] Saunders *v.* McCarthy, 8 Allen (Mass.), 42; Young *v.* Wright, 1 Camp. 139, 141; Parkins *v.* Hawkshaw, 2 Stark. 239; Doe *v.* Richards, 2 C. & Kir. 216; Wilson *v.* Turner, 1 Taunt. 398.

guarded in a similar manner.[1] If the admission was made before suit, it will be equally binding, provided it is shown that the attorney was already retained to appear in the cause.[2] But in the absence of any evidence of retainer at that time in the cause, there must be some other proof of authority to make the admission.[3] When the attorney is already constituted in the cause, admissions made by his managing clerk, or his agent, are received as his own.[4] The admissions of an attorney are not binding upon his client when made in reference to a transaction in which he had no apparent authority to act for him. Thus the declarations of an attorney who sold a note belonging to his client without authority, relative to his title to the note, not made at the time of the sale, are not admissible in an action between the true owner of the note and the purchaser.[5] Nor has an attorney with whom a demand is left for collection, such an interest in a suit brought by him thereon as to make his admissions competent evidence for the defendant in *audita querela* brought to set aside the judgment;[6] nor can admissions made by an attorney in one suit, be used as evidence in another suit between the same parties;[7] nor admissions made by him after his connection with the case has ceased.[8]

Sec. 171. Declarations and Admissions of an Agent.

It is a well settled rule of evidence that *the declarations or admissions of an agent will bind the principal in respect to matters about which he was authorized to act for him, if made at the time of the transaction*, so as to constitute a part of the *res gestæ*,[9] or in reference to a transaction not yet com-

[1] Paddock *v.* Forrester, 3 Scott, N. R. 734 See Jardine *v.* Sheridan, 2 C. & K. 24.

[2] Marshall *v.* Cliff, 4 Camp. 133; Gainsford *v.* Grammar, 2 Camp. 9.

[3] Wagstaff *v.* Wilson, 4 B. & Ad. 339; Burghart *v.* Angerstein, 6 C. & P. 695; Pope *v.* Andrews, 9 C. & P. 564.

[4] Taylor *v.* Williams, 2 B. & Ad. 845, 856; Standage *v.* Creighton, 5 C. & P. 406; Griffiths *v.* Williams, 1 T. R. 710; Truslove *v.* Burton, 9 Moore, 64; Taylor *v.* Forster, 2 C. & P. 195.

[5] Thomas *v.* Kinsey, 8 Ga. 421.

[6] Underwood *v.* Hart, 23 Vt. 120.

[7] Wilkins *v.* Stidger, 22 Cal. 231; Maffit *v.* Witherspoon, 10 Ired. (N. C.) L. 281.

[8] Janeway *v.* Skerritt, 30 N. J. L. 97.

[9] Fairlee *v.* Hastings, 10 Ves. 123; Tuttle *v.* Turner, 28 Tex. 759; Winter *v.* Bent, 31 Ala. 33; Keane *v.* Branden, 12 La. An. 20; Page *v.*

pleted;[1] but in order to make such admissions binding, the authority of the person making them must be established by other evidence than that he acted as a general agent of the

Parker, 40 N. H. 47; Barnard *v.* Henry, 25 Vt. 289; Dykes *v.* Cockerell, 6 La. An. 707; Woods *v.* Banks, 14 N. H. 101; Byers *v.* Lawler, 14 Ark. 87; Lawry *v.* Harris, 12 Minn. 255; Griffin *v.* Montgomery R. R. Co., 26 Ga. 11; Covington, etc., R. R. Co. *v.* Ingles, 15 B. Mon. (Ky.) 237; Hynds *v.* Days, 25 Ind. 31; Tillotson *v.* McCrillis, 12 Vt. 477; Raiford *v.* French, 11 Rich (S. C.), 367; Converse *v.* Blumrich, 14 Mich. 109; Dorne *v.* Southworth Manuf. Co., 11 Cush. (Mass.) 205; Moore *v.* Bettis, 11 Humph. (Tenn.) 267; Rowell *v.* Klein, 44 Ind. 290; Rathel *v.* Brady, 44 Ind. 412; Anderson *v.* Rome, etc., R. R. Co., 54 N. Y. 334; Peck *v.* Ritchey, 66 Mo. 114; Verry *v.* Burlington, etc., R. R. Co., 47 Iowa, 549; Hydorn *v.* Cushman, 16 Hun (N. Y.), 107; White *v.* Miller, 71 N. Y. 118; Furst *v.* Second Ave. R. R. Co., 72 N. Y. 542; Schaefer *v.* Gilden, 3 Col. 15; Treadway *v.* Sioux City, etc., R. R. Co., 40 Iowa, 526; Tuggle *v.* St. Louis, etc., R. R. Co., 62 Mo. 425; Darling *v.* Oswego Falls Manuf. Co., 30 Hun (N. Y.), 276; Phelps *v.* Georgia Creek, etc., R. R. Co., 60 Md. 586; Pavey *v.* Wintrode, 87 Ind. 379; Louisville, etc., R. R. Co. *v.* Henley, 88 Ind. 535.

The declarations of an agent, within the scope of his authority, and in reference to the business in which he is employed, may be proved as the declarations of the principal. American Fur Co. *v.* United States, 2 Pet. (U. S.) 358; City Bank *v.* Bateman, 7 H. & J. (Md.) 104; Sharp *v.* New York, 40 Barb. (N. Y.) 256; Kasson *v.* Mills, 8 How. (N. Y.) Pr. 377; Hunter *v.* Hudson River Co., 20 Barb. (N. Y.) 493; Stewartson *v.* Watts, 8 Watts (Penn.), 392; Chorpenning *v.* Royce, 58 Penn. St. 476; Fring *v.* Breymeyer, 2 Phil. (Penn.) 92. To the contrary, Betts *v.* Bank, etc., 3 Stew. (Ala.) 18. Where the decision of a question depends at all upon the fact whether the plaintiff in a suit had assented to an act which was a deviation from the actor's strict line of duty, and of a kind for which the plaintiff could hold him responsible, it is proper to ask what the plaintiff's attorney said after the act was done; the case being one where an adoption by the plaintiff of the act illegally done concluded his remedy. Rogers *v.* Marshall, 1 Wall. (U. S.) 644. The declaration of an agent of the government, when not forming a part of the *res gestæ*, does not bind the government, and cannot be received as evidence. United States *v.* Martin, 2 Paine (U. S. C. C.), 68. A principal is chargeable with the false representations made by his agent in a sale where the agent is acting within the line of business committed to him. Morton *v.* Scull, 23 Ark. 289; Ferguson *v.* Hamilton, 35 Barb. (N. Y.) 427; Union Bank *v.* Campbell, 4 Humph. (Tenn.) 394. But an agent acting under a written authority from his principal cannot enlarge his powers by his own declarations, so as to bind his principal. Mapp *v.* Phillips, 32 Ga. 72. S. P. National, etc., Co. *v.* Bruner, 19 N. J. Eq. 331; New York, etc., Co. *v.* Beebe, 8 N. Y. 364.

[1] Morse *v.* Conn., etc., R. R. Co, 6 Gray (Mass.), 456; Halsey *v.* Lehigh Valley R. R. Co., 45 N. J. L. 26.

party, and his mere declarations,[1] *and they must relate to the subject-matter of his agency, and be within the scope of his authority.*[2] Neither his declarations nor his acts are sufficient

[1] Craighead *v.* Wells, 21 Mo. 404; Moffit *v.* Cresler, 8 Iowa, 122; Latham *v.* Pledger, 11 Tex. 437; Hatch *v.* Squires, 11 Mich. 185; Fitch *v.* Chapman, 10 Conn. 8; Senserbox *v.* McGrade, 6 Minn. 484; Mapp *v.* Phillips, 32 Ga. 72. In Brigham *v.* Peters, 1 Gray (Mass.), 139, the declarations of an agent, although accompanied by acts as such, were held not to be admissible to establish the fact of agency. Declarations made by the general agent of a telegraph company of its liability for an accident, *two months* after its occurrence, were held to be incompetent. Randall *v.* Northwestern Tel. Co., 54 Wis. 140; 41 Am. Rep. 17. In this case the general superintendent of the company having the general management of his business, sent a telegram two months after an accident, in which the liability of the company for an injury inflicted on the defendant was admitted. The plaintiff introduced this telegram in evidence. The Supreme Court held that it was not admissible, because the authority of the superintendent to admit away the rights of the company, could not be inferred from his position. "The inadmissibility of this evidence," said TAYLOR, J., "is fully established * * * upon well-established principles of law. Milwaukee, etc., R. R. Co. *v.* Tinney, 10 Wis. 388; Betts *v.* Farmers', etc., Co., 21 Wis. 80; Livesley *v.* Lasalette, 28 Wis. 38; Hazleton *v.* Union Bank, 32 Wis. 34; Richards *v.* Noyes, 44 Wis. 609; Ronnsavell *v.* Pease, 45 Wis. 506; Packet Co. *v.* Clough, 20 Wall. (U. S.) 540. These cases show that the rank or station of the person making the admission does not affect the question of its admissibility. In Hazleton *v.* Union Bank, *ante*, the admission of the president of the bank was held inadmissible. In Packet Co. *v.* Clough, *ante*, the admission of the captain of the boat could not be admitted. The authority to make the admission for the principal is not to be inferred from the position or rank of the party making the same. *If such authority is alleged to exist, it must be shown by competent proof.*"

In Webb *v.* Smith, 6 Cal. 365, declarations made by a general agent of a corporation, concerning a debt contracted by him for the corporation within the scope of his authority, were held admissible as *prima facie* evidence.

[2] Fogg *v.* Child, 13 Barb. (N. Y.) 246; Wood *v.* Banks, 14 N. H. 101; Runk *v.* Ten Eyck, 24 N. J. L. 756; Gooch *v.* Bryant, 13 Me. 386; Winter *v.* Burt, 31 Ala. 33; Demeritt *v.* Meserve, 39 N. H. 521; Neeley *v.* Naylee, 23 Cal. 152; Brehm *v.* Great Western R. R. Co., 34 Barb. (N. Y.) 256; Youcum *v.* Barnes, 8 B. Mon. (Ky.) 496; Austin *v.* Chittenden, 33 Vt. 553; Lamb *v.* Barnard, 16 Me. 356; Cooley *v.* Norton, 4 Cush. (Mass.) 93; Thomas *v.* Steinheimer, 29 Md. 268; Beardsley *v.* Steinmesh, 38 Mo. 168; Budlong *v.* Van Nostrand, 24 Barb. (N. Y.) 25; Benedict *v.* Denton, Walker (Mich.) Ch. 336; Waterman *v.* Peet, 11 Ill. 648; Rogers *v.* McCune, 19 Mo. 557. He is bound by the agent's false representations in reference to matters within his authority, although he did not know that the agent had

to establish his authority,[1] unless his acts and declarations upon that and former occasions are such independent proof

made or did not authorize him to make them. N. Y., etc., R. R. Co. *v.* Schuyler, 34 N. Y. 30; Hunter *v.* Hudson River R. R. Co., 20 Barb. (N. Y.) 493. And he is bound by a warranty made by an agent in the sale of a chattel. Elzell *v.* Franklin, 2 Sneed (Tenn.), 236; Williamson *v.* Cannaday, 3 Ired. (N. C.) L. 349; Lane *v.* Dudley, 2 Murph. (N. C.) 119; Marckle *v.* Haskins, 27 Ill. 282.

[1] Seatt *v.* Crane, 1 Conn. 255; Folsom *v.* Batchelder, 22 N. H. 47; Richmond Iron Works *v.* Hayden, 132 Mass. 190; France *v.* Edwards, 77 N. C. 271; Gifford *v.* Landrine, 37 N. J. Eq. 127.

The agency of a party must first be proved by other evidence than his acts, before it can be assumed that his acts are binding on the principal. Scarborough *v.* Reynolds, 12 Ala. 252; Van Eppes *v.* Smith, 21 Ala. 317; Scott *v.* Crane, 1 Conn. 255; Cruikshank *v.* Comyns, 24 Ill. 602; Thurman *v.* Wells, 18 Barb. (N. Y.) 500; Dixon *v.* Haslett, 3 Brev. (S. C.) 475; Bank of Hamburg *v.* Johnson, 3 Rich. (S. C.) 42. Thus, without proof of agency, a warranty of a grass-cutting machine, signed "A B., agent," was offered and received in evidence in an action upon warranty, and it was held that this was erroneous. Gray *v.* Gillilan, 15 Ill. 453.

Where a deed executed by one as agent is exhibited, but his authority is not proved, the title must be considered as residing in his principal, who should have been made a party to the suit; and if the bill is dismissed, it should be without prejudice. Pope *v.* Melone, 2 A. K. Marsh. (Ky.) 239. Relinquishment of title to land, made to the State by a person asserting himself to be an agent, is not operative upon the holder of the title unless the agency is proved. Morgan *v.* Marshall, 7 J. J. Marsh. (Ky.) 316. In an action against a corporation for injury done by their agent it is not necessary to prove that the agent had authority under the corporate seal, nor under an order entered upon the books of the corporation. Hooe *v.* Mayor, etc., of Alexandria, 1 Cranch (U. S. C. C.), 90. The certificate of a notary public, under his notarial seal, of the acknowledgment by the principal of a power of attorney, is sufficient, in Alabama, to authorize its admission in evidence. St. John *v.* Redmond, 9 Port. (Ala.) 428. The authority of an agent to assume the payment of the debt of a third person, for his principal, should be clearly proved, or no recovery can be had upon such promise against the principal. Reading R. R. *v.* Johnson, 7 W. & S. (Penn.) 317. It will not be presumed that the agents of an insurance company have authority to make parol contracts to insure; such authority must be shown affirmatively. The declaration of such agents, in the course of business, that it was not customary to give policies upon such insurances, though they received the premium, is not sufficient to prove the authority of the agents to insure by parol. Ætna Ins. Co. *v.* North Western Iron Co., 21 Wis. 458. To make a letter to an agent evidence in a case, the agency must first be established. Brown *v.* Bank of Missouri, 2 Mo. 191; Brown *v.* Harrison, 17 Ala. 774. In an action against the principal, on paper purporting to be signed by his agent, the agency and authority

as tend to establish a general authority ;[1] that is, unless it is shown that similar transactions entered into by the person claiming to be an agent had been ratified and acted upon by the party sought to be affected by such admissions or declarations.[2] Thus, in the case last cited, proof that a "drummer" for a wholesale house had taken other orders for the same house, which had been regularly filled by it, was held sufficient to authorize evidence of his representations as an agent in its behalf. It is the province of the court to determine whether there is sufficient *prima facie* evidence of agency to render his acts and declarations admissible ;[3] but where there is any legal evidence tending to estab-

to draw checks must be proved to entitle the plaintiff to recover. Flax and Hemp Co. *v.* Ballentine, 16 N. J. L. 454. Where one is agent of another to offer a reward for the apprehension of a criminal, in order to bind the principal, it is necessary to prove the simple fact of the agency, and not the way in which it was created. Currie *v.* Swindall, 11 Ired. (N. C.) L. 361.

[1] Cobb *v.* Lunt, 4 Me. 503 ; Wailes *v.* Neal, 65 Ala. 59.

[2] Nation *v.* Thomas, 25 Tex. 221 ; Murray *v.* Chase, 134 Mass. 92.

[3] Muroe *v.* Stutts, 9 Ired. (N. C.) L. 49. Mere proof of a person's recognition of another's authority to make purchases as his agent on one occasion is not sufficient to charge the former for a subsequent purchase of the same kind (in this case, of cattle and sheep on credit) made by the latter, claiming to act as his agent,—it must be shown that the vendor, at the time of such purchase, was cognizant of those acts of recognition. Maxey *v.* Heckethorn, 44 Ill. 437.

Where the question is whether an agent not having, by the papers which created him such agent and defined his powers, any authority to alter a policy which had been issued by his principal, was permitted to alter policies in respect to dates of sailing, from time to time, so that that became the customary usage and course of business, the evidence must show, in order to bind the principal, at least several cases in which the agent, without asking the sanction of his acts by the principal, had made alterations of a like nature on which the principal had acted, and in which he had acquiesced, when such alterations came to his knowledge ; or it must tend to prove that, although communicated by the agent, they were acquiesced in as acts which he was competent to perform, and as binding on his principal ; or that he was held out to the public as authorized to do such acts. Bunten *v.* Orient, etc., Ins. Co., 4 Bosw. (N. Y.) 254.

The action upon book account to recover for property claimed to have been sold by the plaintiff to the defendant, but which property was in fact sold and delivered to a third person, who was doing business in the name of the defendant, and who, as between himself and the defendant, had no right to pledge the credit of the defendant for the purchase of the property, cannot be sustained upon the ground, merely, that the

lish authority, the whole question may properly be submitted to the jury with instructions to find whether the agent was acting within the scope of his authority in making the admissions, and if not, to lay the evidence out of the case.[1] Proof of authority, independent of the acts or declarations of the agent, must be given.[2] The mere rank or position of the person, as that he is general superintendent, general manager, general agent, etc., of the principal, is not of itself sufficient evidence of his authority to make the ad-

plaintiff was justified in regarding the defendant as the principal in the business, unless he also had sufficient grounds for believing that such third person was authorized to make the purchase upon the credit of the defendant. And such authority cannot be established merely by showing that such third person had, in a few instances, made purchases in the name of the defendant, such purchases having been in fact unauthorized by him before they were made, and not understandingly sanctioned and adopted afterwards. Brown *v.* Billings, 22 Vt. 9.

The rule that an instrument which is apparently the personal obligation of the signer, may by parol be shown to be the obligation of another, for whom the signer was acting as agent, applies exclusively to cases in which it appears in the body of the instrument, or from the signature of the person by whom it is executed, that he was acting for another, and intended to bind such other, and not himself personally. In such cases, where the party to whom the obligation is given understands the character in which the party giving it is acting, parol evidence may, it seems, be given to show that the maker or obligor was acting in the matter as agent merely.

But where there is nothing of that kind, either in the body of the instrument or attached to the signature, to indicate that it was intended to be anything other than a personal obligation, such evidence is inadmissible. Auburn City Bank *v.* Leonard, 40 Barb. (N. Y.) 119.

In an action brought to recover property alleged to have been wrongfully delivered by an agent, who was also a witness, to the defendant, who had notice that such agent was exceeding her authority, the fact that such witness and agent made a written contract with the defendants, which imported that she sold to them such property as her own, does not make evidence that she, at the time, told them the property belonged to the plaintiff, inadmissible. Meserole *v.* Archer, 3 Bosw. (N. Y.) 376.

In an action by a third party against a principal, upon a transaction with the agent of the latter, letters between the principal and agent are admissible in favor of the plaintiff to prove the nature of the agency. Thurston *v.* Mauro, 1 Greene (Iowa), 231.

If the defendant has authorized another to subscribe his name to a note, the fact need not appear on the note, but may be proved by parol. Morse *v.* Greene, 12 N. H. 32.

[1] Wendell *v.* Abbott, 45 N. H. 349.

[2] Wailes *v.* Neal, 65 Ala. 59.

mission *unless it was made in reference to a transaction in which he participated, and under such circumstances as make it a part of the res gestæ*;[1] consequently, except where made by the agent *as and for* the principal, and with competent authority, in order to be admissible, they must constitute a part of the *res gestæ*. The true doctrine in reference to the admissibility of this class of evidence was stated by DALLAS, C. J., in an early English case.[2] He said, "It is not true that where an agency is established, the declarations of the agent are admitted, merely because they are his declarations; *they are only evidence when they form a part of the contract entered into by the agent on behalf of the principal*, and in that single case they become admissible. The declarations of an agent at a different time have been decided not to be evidence; indeed, the cases on the subject draw this distinction between the declarations of an agent accompanying the making of, and therefore forming a part of, the contract, and those made either at a subsequent or antecedent period." These declarations, when admissible, constitute original evidence, and are not mere hearsay. *They bind the principal only when made during the continuance of the agency in regard to a matter then depending et dum ferret opus*. The ground upon which they are admitted is the legal identity of the principal and the agent, and the fact that his declarations are a part of the *res gestæ*.[3] Therefore it will be seen that the declarations of an agent, *made after the transaction to which they relate is ended*,[4] or *not*

[1] Randall *v.* Northwestern Tel. Co., 54 Wis. 140; Scott *v.* Middletown, etc., R. R. Co., 86 N. Y. 200. The declarations of an agent are received as evidence against his principal, not as admissions, *but because they are a part of the res gestæ*. Haven *v.* Brown, 7 Me. 425; Virginia, etc., R. R. Co. *v.* Sayers, 26 Gratt. (Va.) 328.

[2] Betham *v.* Benson, Gow, 48; Coyle *v.* Baltimore, etc., R. R. Co., 11 W. Va. 94.

[3] HENRY, J., in McDermott *v.* Hannibal, etc., R. R. Co., 73 Mo. 516; 39 Am. Rep. 526; Griffin *v.* Montgomery R. R. Co., 26 Ga. 111; Moore *v.* Meacham, 10 N. Y. 207; Robinson *v.* Fitchburgh, etc., R. R. Co., 7 Gray (Mass.), 92; Galceran *v.* Noble, 66 Ga. 307; Franklin Bank *v.* Steam Navigation Co., 11 G. & J. (Md.) 28.

[4] Jordan v. Stewart, 23 Penn. St. 244; Hadspeth *v.* Allen, 26 Ind. 165; Levy *v.* Mitchell, 6 Ark. 138; Brigham *v.* Carr, 21 Tex. 142; Caldwell *v.* Garner, 31 Mo. 131; Water-

accompanied by an authorized act,[1] *or which are beyond the scope of his authority,*[2] are not admissible against the principal. The rule is that, whenever it is proved that a person is the agent of another as to a special matter, or generally, whatever such person says, does or writes in reference to such matter, during the pendency of the transaction to which his agency relates, and in pursuance thereof, is evidence against the principal, but it is not admissible merely as the agent's account of what has passed.[3] Mr. Roscoe, in his Digest of the Law of Evidence, p. 72, illustrates this rule thus:

The declaration of a servant employed to sell a horse is evidence to charge the master with a warranty, if made at the time of sale; but statements made at any other time are not admissible against him.[4] So where the servant of a horsedealer, who was employed to take a horse to the stables of the purchaser, had signed a receipt containing a warranty, this receipt without proof of the servant's authority to give a warranty was rejected in an action against his master.[5] An admission by a servant, in a transaction not relating to the business in which he is employed, is not evidence against his master. Thus where a pawnbroker's shopman was heard to state that his master had lent £200 at 5 per cent on the security of certain plate, this was held inadmissible as against the master.[6] *But if the statement had been made by him in the course of a transaction in the ordinary course of a pawnbroker's business, it would have been different.*[7] The letters of an agent to his principal, containing a narrative of past transactions in which he had been employed, are not admissible in evidence against the principal.[8] An admission by a

man *v.* Peet, 11 Ill. 648; Raiford *v.* French, 11 Rich (S. C.), 367; Craig *v.* Gilbrath, 47 Me. 416; Austin *v.* Chittenden, 33 Vt. 553; Keeler *v.* Salisbury, 33 N. Y. 648.

[1] Turnpike Co. *v.* Thorpe, 13 Conn. 173.

[2] Wright *v.* Georgia R. R., etc., Co., 34 Ga. 330.

[3] Langhorn *v.* Allnutt, 4 Taunt. 519.

[4] Helyear *v.* Hawke, 5 Esp. 72.

[5] Woodin *v.* Burford, 2 Cr. & M. 391.

[6] Garth *v.* Howard, 8 Bing. 451.

[7] Schumack *v.* Lock, 10 B. Moo. 39.

[8] Kahl *v.* Jansen, 4 Taunt. 565; Fairlie *v.* Hastings, 10 Ves. 128; Betham *v.* Benson, Gow, 45.

person who has generally managed A.'s landed property, and received his rents, is not evidence against A. as to his employer's title, there being no other proof of his agency *ad hoc*.[1] So in an action against a surety, the admissions or declarations of the principal, to whom goods have been sent by the plaintiff at the defendant's request, are not evidence against the defendant either as to the receipt of the goods, or as to other facts respecting them.[2] But a letter from an agent abroad, stating the receipt of money, coupled with the answer of the principal directing the disposition of the money, will be evidence of the receipt by the principal.[3] The admissions of an under-sheriff are evidence against a sheriff, for he is the general agent of the sheriff;[4] but not unless they accompany an act done, or they tend to charge himself, he being the real party in the cause.[5] The admissions of a bailiff are evidence against the sheriff, like the statements of any other agent, only when they form part of the transaction.[6] The admissions of a surveyor of a corporation respecting a house belonging to the corporation are evidence against the latter in an action for an injury to the plaintiff's house by works done on the defendant's premises.[7] Evidence may be given against companies of admissions made by their directors or agents relating to matters within the scope of their authority.[8] So a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M., was admitted on behalf of his executors, in proceedings against them.[9] The secretary of a projected company has not, by virtue only of his office, any power to bind the members of the provisional committee by admissions.[10] The evidence of admission by

[1] Ley *v.* Peter, 3 H. & N. 101.

[2] Evans *v.* Beattie, 5 Esp. 26; Bacon *v.* Chesney, 1 Stark. 192.

[3] Coates *v.* Bainbridge, 5 Bing. 58.

[4] Drake *v.* Sykes, 7 T. R. 117.

[5] Snowball *v.* Goodricke, 4 B. & Ad. 541.

[6] North *v.* Miles, 1 Camp. 389.

[7] Peyton *v.* S. Thomas' Hospital, 3 M. & Ry. 625, n.; and see London, Mayor of, *v.* Long, 1 Camp. 25; Reg. *v.* Adderbury, East, 5 Q. B. 187.

[8] Meux's Case, 2 D., M. & G. 522.

[9] National Exchange Co. of Glasgow *v.* Drew, 2 Macq. 103.

[10] Burnside *v.* Dayrell, 3 Exch. 225. In Bruff *v.* Gt. N. Ry. Co., 1 F. & F. 345, an admission of a secretary of a company as to the re-

servants of a railway company as to the cause of the loss, or delay in delivering goods, has been held not admissible.[1] All the rules applicable in the case of agents are applicable in the case of master and servant, and the admissions of the servant may be said not to be admissible against the master, except when they are made in reference to matters in which the acts of the servant will bind the master, and when they form a part of the *res gestæ*.[2] Thus, where a witness testified that a few days prior to the demand of a chair by the plaintiff, he, at the plaintiff's request, went to the defendant's hotel for the chair, and that while there, but in the absence of the defendant, he asked the defendant's clerk, who had the general supervision and charge of the hotel, if the chair was there, at the defendant's hotel, and the clerk replied that it was, it was held that this was a declaration in respect to matter in regard to which the clerk had full means of knowledge, and tended to show that the chair was at the defendant's hotel when the witness called for it.[3] So, in an action against a railway company on account of injuries received by the plaintiff's wagon and horses from a collision with the defendant's cars, it was held that statements made at the time by the servant who was driving the plaintiff's wagon, as to the cause of the accident, were admissible as a part of the *res gestæ*;[4] and the same rule was also applied in an action against a railroad corporation by a passenger for the loss of his trunk, and the admissions of the conductor, baggage-master or station-master, as to the manner of the loss, made in answer to inquiries on behalf of the passenger the next morning after the loss, were held admissible against the corporation.[5] But this class of admissions or declarations are not admissible unless they are a part of the *res gestæ*, and if made after the act to which they

ceipt of a letter was held not admissible. See, also, Ridley *v.* Plymouth Banking Co., 2 Exch. 711.

[1] Gt. Western Ry. Co. *v.* Willis, 18 C. B., N. S. 748; Brewing Co. *v.* Furness Ry. Co., L. R. Q. B. 468.

[2] Black *v.* Camden, etc., R. R. Co., 45 Barb. (N. Y.) 40; Weeks *v.* Barron, 38 Vt. 420; Maury *v.* Talmadge, 2 McLean (U. S. C. C.), 157.

[3] Weeks *v.* Barron, 38 Vt. 420. See *ante*, § 154.

[4] Toledo, etc., R. R. Co. *v.* Goddard, 25 Ind. 185.

[5] Morse *v.* Connecticut River R. R., 6 Gray (Mass.), 450.

relate has transpired, so that they cannot be said to be connected with and a part of the act itself, as an half hour,[1] or any other period of time so remote from the principal act that they cannot be said to be a part of it, they are not admissible, except where they are made while still discharging a duty which has been imposed upon him by the master, as was the case in the case last cited. Thus, in an action against a railway company to recover damages for running over and killing cattle, statements made by the engineer, some time after the killing, are not admissible.[2]

[1] Nashville, etc., R. R. Co. *v.* Messino, 1 Sneed (Tenn.), 220.

[2] Price *v.* N. J. Railroad Co., 31 N. J. L. 229; Aldridge *v.* Midland Blast Furnace Co., 78 Mo. 539. In Hanover Railroad Co. *v.* Coyle, 55 Penn. St. 402, where a peddler's cart had been overthrown by a railway train, in an action for the injury the plaintiff was permitted to prove the declarations of the engineer at the time of the accident, for the purpose of showing the train was behind time, and thus show carelessness and negligence as a part of the *res gestæ*. The supreme court say: "The record shows no bill of exceptions to this evidence; but if it did, we cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time of the accident, in view of the goods strewn along the road by the breaking up of the boxes; and it seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the transaction itself." In Luly *v.* Hudson River Railroad Company, 17 N. Y. 131, where the suit was for alleged negligence in running against the plaintiff, the plaintiff was allowed to prove by a policeman, who was present when the accident occurred, that he, being called on by the crowd then present, arrested the driver of the car, and while getting out of it and out of the crowd, being asked why he did not stop the car, he said that the brake was out of order. And the Court of Appeals reversed the case because this evidence was admitted, holding that this declaration of the driver was not a part of the *res gestæ*. It was no part of the driver's act for which the company was sued. The court say: "It was not made at the time of the act so as to give it quality and character. The alleged wrong was complete when he made the statement, and the driver was only endeavoring to account for what he had done." So in Belfontaine Railroad Company *v.* Hunter, 33 Ind. 335; 5 Am. Rep. 201, the court held that in an action against a railroad company by an administrator to recover damages for the death of his decedent, occasioned by the collision of a locomotive and train of cars and a wagon in which the decedent was crossing the track, the declarations of the fireman employed on the locomotive at the time of the collision, made on the

Statements made by the captain of a passenger steamer soon after the injury of a passenger by the lurching of the vessel, that the place was dangerous by reason of the absence of a hand-rail, and that he could have it remedied, were held inadmissible,[1] and the same is true as to statements made by a conductor, engineer or other employee of a railway company, *after* an accident.[2]

In a New York case the defendant agreed to pay to the plaintiff a sum of money, in consideration of the plaintiff suffering his wife to live separate, and delivering to her certain property. In a suit for the money, the wife's declarations that she had received the property were held admissible against the defendant, she being his agent for this purpose, and her receipt was held evidence of the delivery, as also was her parol admission.[3]

In a Pennsylvania case, the defendant having written to

arrival of said train bearing the body of the deceased at a station one mile from the place of the accident, were not admissible as a part of the *res gestæ*. And in Lum *v.* Bryant, 9 Gray (Mass.), 245, in an action to recover damages sustained by a collision between the defendant's and the plaintiff's carriage, evidence that the defendant's servant, who had charge of his carriage, immediately after the collision, and while the defendant was being taken from his carriage, and while the crowd was about, said the plaintiff was not to blame, yet the court held that this declaration of the defendant was not admissible as a part of the *res gestæ*. The court say: "It was made after the accident occurred and the injury to the plaintiff's carriage had been done. It did not accompany the principal act or tend in any way to elucidate it. It was only the expression of opinion about a past occurrence and not a part of the *res gestæ*." It is not more competent because made immediately after the accident than if made a week or a month afterward. Land *v.* Tyngsborough, 9 Cush. (Mass.) 36.

[1] American S. S. Co. *v.* Landreth, 102 Penn. St. 131; 48 Am. Rep. 196. In Packet Co. *v.* Clough, 20 Wall. (U. S.) 528, the court, in reference to such admission, said, "The captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal or any servant of his principal has been guilty of negligence in receiving them. There is no necessary connection between the admission and the act."

[2] Virginia, etc., R. R. Co. *v.* Sayres, 26 Gratt. (Va.) 351; Robinson *v.* Fitchburg R. R. Co., 7 Gray (Mass.), 92; Griffin *v.* Montgomery R. R. Co., 26 Ga. 111; Hawker *v.* Baltimore, etc., R. R. Co., 15 W. Va. 628; 36 Am. Rep. 825.

[3] Fenner *v.* Lewis, 10 John. (N. Y.) 38, 44, 45.

the plaintiff that he would be accountable with W. for any contract he would make for the purchase of goods, in an action for goods sold to W. it was held that a letter from W. subsequent to the purchase, acknowledging the purchase of goods from the plaintiff, was evidence against the defendant.[1] Accordingly it is said the letters of an agent cannot be received in evidence to prove facts stated in them. He is a competent witness, and should be sworn to prove these. But his letters may be received to show what facts he has stated in the course of his business as agent, in order to explain upon what motives and principles the party receiving them acted; though the facts stated must be proved otherwise.[2]

In a Connecticut case, in assumpsit for money had and received, the plaintiff offered in evidence what the defendant's agent who received the money said, and it was held that what he said and did in that transaction was the same as said and done by the defendant.[3] To repel a plea of usury to a promissory note, the plaintiff offered to show what the defendant's son had said while acting as agent in relation to the transaction in question, and it was held admissible.[4] So an entry of deposit by the agent of a bank in a bank-book accompanying the deposit, is a conclusive admission against the bank; otherwise if made afterwards.[5] So the entry in a bank-book of a dealer, of the amount of his deposit, made by a teller or clerk of the bank, is an entry by the bank agent. He is *not the agent of the dealer*, and a mistake may be shown by the latter.[6] So in assumpsit for the price of hides sold by a butcher, against the proprietors of a tan yard, their general manager of the yard, who had power to buy hides and sell leather, gave the plaintiff three certificates of different dates; one that $1,640.75 was due the plaintiff on settlement; one that $2,843.25, and another

[1] Meade *v.* M'Dowell, 5 Binn. (Penn.) 195.

[2] Blight *v.* Ashley, 1 Pet. (U. S. C. C.) 15, 21.

[3] Perkins *v.* Burnet, 2 Root (Conn.), 30.

[4] Mather *v.* Phelps, 2 id. 150.

[5] Manhattan Co. *v.* Lydig, 4 John. (N. Y.) 389.

[6] Mechanics & Farmers' Bank in the city of Albany *v.* Smith, 19 John. (N. Y.) 115.

that $1,297.30 worth of hides had been received by him from such a day to such a day, mentioning the time in each certificate, and signed his name; and these certificates were held admissible to charge the defendants. MARSHALL, CH. J., said the proprietors themselves might have given such papers, and their general manager had the same power; and the court held all the papers receivable in evidence against the defendants, including that which certified the settlement or balance struck.[1] So to prove a loss on an adventure shipped to New York, the account of sales by the factor was received in evidence on proving his signature to the account.[2] And the log-book of a ship is evidence for the owner; but it must be proved to have been regularly made. Proof of the mate's handwriting in many parts, and that a sailor saw him writing "log-book of the Lydia," the name of the ship, during the voyage, is not enough.[3] Such strict proof would, of course, not be necessary where it is used against the owner. So the declaration of a sheriff or auctioneer as to what property is up for sale, as whether it be the whole farm or only a certain parcel of it, is admissible.[4] And in assumpsit for ten kegs of dollars, against a bank, the plaintiff proved that the kegs, being brought to the bank against the plaintiff's will, were paid out for the debts of the bank by the direction of H. and B., president and cashier *pro tempore*. And this was held admissible, though H. and B. were both within reach of a subpœna, because a president and cashier of a bank may direct money in the bank to be paid out for the debts of the institution. But the subsequent admission of the president as to a bag of dollars which had been brought into the bank and converted by a stockholder, that this was the plaintiff's property, was held inadmissible.[5] So on a libel against goods, as being forfeited by illegal exportation, in a trade with the Indians, the decla-

[1] Barry *v.* Foyles, 1 Pet. (U. S. C. C.) 311; Rawson *v.* Adams, 17 John. (N. Y.) 130.

[2] Rich *v.* Broadfield, 1 Dall. (U. S.) 16.

[3] United States *v.* Mitchell, 2 Wash. (U. S. C. C.) 478.

[4] Wright *v.* Deklyne, 1 Pet. (U. S. C. C.) 199, 201, 204.

[5] The City Bank of Baltimore *v.* Bateman, 7 H. & J. (Md.) 104.

rations and acts of the exporters' agent, or of any one who acted in conjunction with the exporters in the course of their business, were held admissible as evidence against the goods.[1] So, in a statute proceeding to recover for labor done on the respondent's ship, he insisted that the libelant had been paid by a note of W. and C., former owners. The libelant insisted that the note was not paid, but renewed and discounted, the money going to W. and C. A witness for the libelant proved that W. and C.'s clerk came to the libelant, and requested him to renew the note, which he did. Objected that this was hearsay, and that the clerk should be sworn as a witness; but the objection was overruled. The court say, being clerk of W. and C., he was their agent; and his sayings and doings were matters of fact.[2] And though the acts of a deputy surveyor in surveying state lands for A. cannot be given in evidence for him without producing the public authority under which the deputy acted, yet the unauthorized act of the deputy, done or attempted by the procurement of A., may be given in evidence against him.[3] So in an action by the owners of a vessel on a policy of insurance, the protest of the master and mariners is admissible evidence for the plaintiffs, and of course for the defendants,[4] as, for instance, as to the cause of deviation, or the seaworthiness of the vessel.[5] The plaintiff made an agent to receive certain moneys collected for him by the defendant. It was held that the agent's drafts on, and receipts to, the defendant for money, his letters in the course of the business to the defendant, and an account and balance struck between them in respect to the money, and the agent's admission of payment at the time of so settling, were all evidence for the defendant. The agent need not be made a witness by him.[6] So a letter from the debtor's agent (authorized to do the act), directing

[1] American Fur Co. *v.* United States, 2 Pet. (U. S. C. C.) 358.

[2] Ship Portland *v.* Lewis, 2 S. & R. (Penn.) 197, 203.

[3] Unger *v.* Wiggins, 1 Rawle (Penn.), 331.

[4] Miller *v.* S. C. Ins. Co., 2 M'Cord (S. C.), 336; Campbell *v.* Williamson, 2 Bay, 237.

[5] Id.

[6] Thallhimer *v.* Brinkerhoff, 6 Cow. (N. Y.) 90, 99, 100. And see Sherman *v.* Crosby, 11 John. (N. Y.) 70.

the creditor on which of several debts to apply certain moneys paid, were held admissible to prove the application of the payment.[1] In a New York case the party had employed Fitch as agent to sell for him a quantity of barilla, who sold part to the defendant, who gave his note. The barilla was in truth worth nothing; and in an action on the note, the defense being that there was fraud, the defendant proved the declarations of Fitch in respect to the quality of the remaining quantity on hand, after the sale to the defendant. The court thought that, as Fitch was agent for selling the whole, his declarations, while engaged in that agency, were admissible against the plaintiff. But the cause went off mainly on another point.[2]

In an action for money had and received, it appeared that the defendants' agents had directions to receive the money and remit it to the defendants. A letter from the agents admitting they had received it—that letter being answered by one from the defendants—was therefore received in evidence against the defendants, as a declaration made in the course of their business as agents. The object of the letter was to show the money to be in the hands of the defendants' agents.[3] In assumpsit on a promise to remove certain mud, which the defendant's foreman had asked leave to throw on plaintiff's land, on cleansing a stream for the benefit of the defendant's mill, the plaintiff offered to prove what the defendant's clerk in his counting-house, and who also had the internal management of the mill, had directed the foreman as to cleaning the stream and taking away the mud. It was held inadmissible. The act of throwing out the mud was not within the ordinary business of the defendant as a miller, and the clerk who managed the mill could not, therefore, interfere. Suppose, said BEST, C. J., the defendant's house had been out of repair, the repairing would not, come within the business of the clerk as agent in the counting-room.[4] In a North Carolina case the acknowledgment of

[1] Mitchell *v.* Dall, 2 H. & G. (Md.) 159, 170.

[2] Welch *v.* Carter, 1 Wend. (N. Y.) 185, 190, 191.

[3] Coates *v.* Bainbridge, 5 Bing. 58.

[4] Shumack *v.* Lock, 10 B. Moore, 39.

the cashier of a bank, that a note had been paid, was received, and held *prima facie* evidence against the bank.[1] So where the wife of the plaintiff, who was shown to be the plaintiff's agent for the purpose, declared that the demand in question had been sold by her to F., this was held admissible as evidence against the plaintiff, and that any one might safely treat with F. concerning it.[2] In this case the plaintiff had left the state, leaving the whole control of this business with his wife.

But where the declarations or admissions of an agent relate to a matter not within the scope of his authority, they are not admissible against his principal, although they refer to acts within his authority ;[3] and this has been held to be the rule even when the admissions of the agent were contained in a sworn answer to a bill in equity.[4] Thus in an action for work and labor, the plaintiff was allowed to prove by D. the declaration of the defendant's agent concerning buildings erected by the plaintiff on the farm of a third person, with whom it did not appear the defendant had any connection. This was left to the jury, with instructions that, if they believed D., they should find for the plaintiff. It was held erroneous, for no connection was shown between the defendant and the third person.[5] In a Virginia case the defendant, by F., his agent, purchased certain trees of the plaintiff's intestate. It was held that a subsequent written account, made by F., of the timber cut under F.'s direction for the defendant, was not admissible in evidence against him.[6] So in assumpsit for the price of pig iron, the delivery was sought to be proved by the certificate of the defendant's clerk, dated November, 1815, that the quantity of pig iron delivered to him by the plaintiff in October and November, 1814, was so much. It was held inadmissible, it being a past transaction,

[1] State Bank *v.* Wilson, 1 Dev. (N. C.) 484.

[2] Curtis *v.* Ingham, 2 Vt. 287, 289.

[3] Webb *v.* Alexander, 7 Wend. (N. Y.) 281 ; Barclay *v.* Howell, 6 Pet. (U. S.) 404.

[4] Leeds *v.* Marine Ins. Co., 2 Wheat. (U. S.) 380.

[5] Irvine *v.* Buckaloe, 12 S. & R. (Penn.) 35.

[6] Pasteur *v.* Parker, 3 Rand. (Va.) 458.

and not a receipt given at the time, which, *semble*, would have been evidence. The plaintiff should have sworn the clerk as a witness.[1] Again : in an action for money had and received, the claim arose from the defendant having received money from the treasury for certain rations furnished to the army by one Bradshaw. The plaintiffs claimed that Bradshaw, now deceased, was their agent in furnishing the rations ; and the defendant, that he was his agent in furnishing them. The defendant offered in evidence a written statement of facts by Bradshaw, respecting the matter in controversy, made to be submitted to referees in a controversy between himself and one Duncan, and it was held inadmissible. The plaintiffs then offered in evidence Bradshaw's letter denying that the defendant had supplied the rations ; but this was in answer to certain declarations of his to the contrary, which the defendant had given in evidence, and it was held admissible only in this point of view, but not as proof of an independent fact.[2] In an action for money paid as a premium in effecting an insurance for the defendant, W., as the defendant's agent, requested the plaintiff to insure, and gave to the plaintiff his (W.'s) own note, but failed. The plaintiff offered to prove the subsequent declarations of W., that the defendant would pay the debt, and it was held inadmissible. The reason given is, that W. was agent only to effect the policy, not to bind the defendant by a subsequent promise to pay.[3]

So in ejectment founded on an entry and survey, the admission of the plaintiff's agents and surveyors that they had agreed to a survey which should not interfere with the defendants, was held inadmissible against the plaintiff, not being made in the course of their acts as agents, but afterwards.[4] But in the New York case the surveyor was dead, and it was a declaration as to boundaries, and in the case from Peters, the declarations of the surveyor were while he was acting as

[1] Glasser *v.* Reno, 6 S. & R. (Penn.) 206.

[2] Turnbull *v.* O'Hare, 4 Yeates (Penn.), 446.

[3] Millick *v.* Peterson, 2 Wash. (U. S. C. C.) 31.

[4] Meredith *v.* Kennedy, Litt. Sel. Cas. (Ky.) 516. See M'Cormick *v.* Barnum, 10 Wend. (N. Y.) 104, and Barclay *v.* Howell, 6 Pet. (U. S.) 498.

such. In trover against four, two of them owners, and two agents of the owners in managing a warehouse, the two agents admitted that they, by the owners' orders, converted the plaintiff's whiskey, which he had at the warehouse; but their admissions were held inadmissible, as they were not made at the time of their doing the acts complained of.[1] In a New York case the plaintiff appointed an agent to settle with and receive money from the defendant for a debt. The defendant, to prove a settlement and payment between him and the agent, offered in evidence an account current, to which the agent had made an affidavit, and it was held not admissible, it being the admission of past acts of the agent, and the admission not within the scope of his authority.[2] So the declarations of one who had been an agent to make a contract, after he had made it, though he was still an agent to make like contracts for the same party, were held inadmissible to affect his principal in respect to the terms or construction of the former contract; for such were not a part of the *res gestæ*.[3]

So the declarations of an agent that he had given license to enter and cut timber are not admissible against his principal, being an admission of what was past.[4] The maker gave a proposition for time on his note at the bank to the cashier, who, as he promised, submitted the proposition to the directors, and came and told the maker that the proposition had been accepted. It was proposed to give this in evidence against the bank, the cashier being their general agent, which fact was admitted. But it was held that, notwithstanding, this information was not a part of the *res gestæ*. He did not himself make the contract for time; it was made by the directors. He merely carried the proposal and brought back the answer; and the information being but hearsay, it was held the agent must be sworn.[5] An agent appointed to superintend the execution of a survey in a suit of chancery

[1] Roberts, etc., *v.* Burks, Litt. Sel. Cas. Ky. 411.

[2] Thallhimer *v.* Brinckerhoff, 4 Wend. (N. Y.) 394.

[3] Haven *v.* Brown, 7 Me. 421.

[4] Hubbard *v.* Elmer, 7 Wend. (N. Y.) 446.

[5] Grafton Bank *v.* Woodward, 5 N. H. 301.

has no authority to admit the notoriety of any object whose notoriety may be material in the cause.[1] In detinue for the plaintiff's goods, pawned without his authority to the defendant, a pawnbroker, the only evidence to charge the defendant with possession was the admission of the defendant's shopman, made at the house of the plaintiff's attorney, and TINDAL, C. J., delivering the opinion of the court, said if the transaction had been one in the ordinary trade and business of the defendant as a pawnbroker, in which trade the shopman was his agent or servant, a declaration that his master had received the goods might probably have been evidence, as it might be held within the scope of the shopman's authority to give an answer to an inquiry made by any person interested in goods deposited with the pawnbroker. But he said this deposit was on an ordinary loan at five per cent, out of his line as pawnbroker, a case in respect to which the shopman had no authority.

Sec. 172. Knowledge of, or Notice to, Agent affects Principal, when.

It is well settled that notice to an agent, actual or implied, relative to a matter affecting his agency and while such agency exists, is notice to the principal, and such is also the rule as to a knowledge of facts relating to the business of his agency, acquired while acting for his principal;[2] and this rule applies with equal force where a person in the first instance assumed to act for another without authority, but

[1] Robinson *v.* Morgan, Litt. Sel. Cas. (Ky.) 56.

[2] Wood on Railways, 457; Walker *v.* Ayers, 1 Iowa, 449; Astor *v.* Wells, 4 Wheat. (U. S.) 466; Reed's Appeal, 34 Penn. St. 207; Hough *v.* Richardson, 3 Story (U. S. C. C.), 659; Sutton *v.* Dillaye, 3 Barb. (N. Y.) 529; Varnum *v.* Milford, 4 McLean (U. S. C. C.), 93; Patten *v.* Merchants', etc., Ins. Co., 40 N. H. 375; Wiley *v.* Knight, 27 Ala. 336; Keenan *v.* Missouri Ins. Co., 12 Iowa, 126; Ingalls *v.* Morgan, 10 N. Y. 178; Felter *v.* Field, 1 La. An. 80; Mundine *v.* Pitts, 14 Ala. 84; Smyth *v.* Oliver, 31 id. 39; Page *v.* Brunt, 18 Ill. 37; Musser *v.* Hyde, 2 W. & S. (Penn.) 314; Fowler *v.* Halbert, 4 Bibb (Ky.), 52; Boyd *v.* Vanderkamp, 1 Barb. (N. Y.) Ch. 273; Owens *v.* Roberts, 46 Wis. 258; Pepper *v.* George, 51 Ala. 190; Rouch *v.* Karr, 18 Kan. 329; Allen *v.* Poole, 54 Miss. 323; Saulsbury *v.* Wimberley, 60 Ga. 78; Campau *v.* Konan, 39 Mich. 362; Hier *v.* Odell, 18 Hun (N. Y.), 314; Sooy *v.* State, 41 N. J. L. 394.

whose act in that respect was ratified by the principal — the rule being that if he takes the benefit of the act, he must take it charged with notice of such matters as were at the time within the knowledge of the agent.[1] But in order to impute the knowledge of the agent to the principal, *it must be shown that he acquired the knowledge while acting as such agent; and it must relate to the business of his agency.*[2]

Upon this proposition the authorities are by no means uniform, and many respectable decisions are to be found sustaining both the affirmative and the negative; but it seems to us that as the rule in either view is arbitrary, and as the notice at best is only constructive, *and may never in fact have been given to the principal, it should be restricted to such notice and knowledge of facts as is received by the officer or agent, not only at a time when he was an officer or an agent, but also when he was acting as such*, and that the rule which is adopted in some of the cases,[3] — that the question

[1] Hovey *v.* Blanchard, 13 N. H. 145.

[2] Brown *v.* Bankers, etc., Tel. Co., 30 Md. 39. See cases cited *post*, n., p.

[3] Fairfield Savings Bank *v.* Chase, 72 Me. 226; Distilled Spirits, 11 Wall. (U. S.) 356; Lebanon Savings Bank *v.* Hallenback, 29 Minn. 322; Dresser *v.* Norwood, 17 C. B. N. S. 466; Ingalls *v.* Morgan, 10 N. Y. 178; Hovey *v.* Blanchard, 13 N. H. 145; Chotean *v.* Allen, 70 Mo. 290. But see Ford *v.* French, 72 id. 250; First National Bank of Highstown *v.* Christopher, 41 N. J. L. 435; 29 Am. Rep. 262. A distinction has been taken between knowledge of illegality or want of consideration of a note by a director who acts with the board in discounting it, and such knowledge on the part of a director who is not present and acting with the board when the discount is made. In the former case it has been held that the bank is bound by his knowledge; in the latter it is not. Bank of the United States *v.* Davis, 2 Hill (N. Y.), 451; North River Bank *v.* Aymar, 3 id. 262; National Security Bank *v.* Cushman, 121 Mass. 490; Farmers', etc., Bank *v.* Payne, 25 Conn. 444; Farrell Foundry *v.* Dart, 26 id. 376; National Bank *v.* Norton, 1 Hill (N. Y.), 572; Washington Bank *v.* Lewis, 22 Pick. 24; The President, etc., *v.* Cornen, 37 N. Y. 320; 2 Lead. Cas. in Eq. 171, note to Le Neve *v.* Le Neve. The question how far the knowledge of an officer of a corporation, which he acquired outside of the business of the company, and which was not, in fact, communicated to the corporation, is binding upon it, when it relates to dealings between the officer and the corporation, was considered by the chancellor in Barnes *v.* Trenton Gaslight Co., 27 N. J. Eq. 33. The bill was filed to set aside a conveyance made by executors in fraud of the powers contained in the will. The conveyance was made to Mr. Potts, who

as to whether such notice or knowledge, received by an agent before he was appointed as such, shall be imputable to the principal, depends upon the circumstance *whether the fact was present in the mind of the agent* when acting for the principal, so fully that he could not have forgotten it — is both unreasonable and unjust. In these cases, the court seems to lose sight of the consequences of such a rule, and also of the circumstance that, while the rule relative to such knowledge of an agent rests upon a presumption that the agent would do his duty and disclose the facts to his principal, yet the presumption is irrebuttable, and the principal is not permitted to show that the agent did not in fact discharge his duty.

This rule opens up a new field of inquiry in such cases, which is one of fact, to wit, whether the fact sought to be imputed to the principal *was in the mind of the agent at the time of the transaction in reference to which it should be disclosed.* . Who should determine this fact ? If, however, as seems probable from the qualification of the rule by the

was the legal adviser of the executors, and also president of the gaslight company. Potts conveyed directly to the company, and the bill charged notice on the defendants solely on the ground that at the time of the conveyance to the company Mr. Potts was its president. On demurrer, it was held that the information which came to Mr. Potts' knowledge, as counsel of the executors, was not constructively notice to the corporation, and that the company was a *bona fide* purchaser without notice. In Choteau *v.* Allen, *ante*, it was held that the principal is affected with knowledge of such facts by the agent as the agent had acquired previously to the agency, *and which he had in mind* at the time of the transaction for the principal. But in Ford *v.* French, *ante*, it was held that knowledge of facts acquired by an attorney in *one* case could not be imputed to his client in another case. In Yenger *v.* Banz, 56 Iowa, 77, it was held that the principal is not affected by information imparted to his agent before the agency existed, which has not been retained in mind by the agent. It will be seen that in all these cases the doctrine is predicated upon a doubtful presumption that the agent, by reason of the shortness of the time which has elapsed since the information was received, retained it in mind at the time of the transaction for the principal. But the trouble with the rule is, that while the presumption upon which it rests is doubtful, it is nevertheless irrebuttable, and precludes all testimony to show that the agent *did not have* the knowledge in mind, and that he did not in fact communicate it to the principal. DEPUE, J., in First National Bank *v.* Christopher, *ante*.

courts — to the effect that the knowledge must be so fully present to the mind of the agent when acting for the principal *that he could not have forgotten it* — it is intended that the presumption shall be irrebuttable, then the harshness and absurdity of the rule is still more glaring. Now, who has the power to say what the capacity of the agent's memory is? It is a matter demonstrated by universal experience that the powers of memory vary greatly in different persons, and while one person will remember even trifling circumstances for a long period, yet other equally competent persons will forget the most important facts within a very few hours. So, too, it is well understood that circumstances may exist at the time of a transaction which suppress the remembrance of important facts connected therewith, until it is too late to make use of them. There is not probably a business man who has not had the truth of this proposition demonstrated in his own experience; consequently, as there is and can be no presumption that a person carries in his mind for any considerable period a recollection of every circumstance that he has had an acquaintance with, there is no reason for the doctrine referred to. This being so, it seems to us that the only reasonable and just rule in reference to imputing the knowledge of an agent to his principal, is that which is so universally adopted, confining it to knowledge of facts relating to the agency, and acquired at a time when he was discharging the duties of his agency.[1] In England the rule is now as stated

[1] Astor *v.* Wills, 4 Wheat. (U. S.) 466; Reed's Appeal, 34 Penn. St. 207; Walker *v.* Ayers, 1 Iowa, 449; Hough *v.* Richardson, 3 Story (U. S.), 659; Sutton *v.* Dillaye, 3 Barb. (N. Y.) 529; Wiley *v.* Knight, 27 Ala. 336; Keenan *v.* Missouri Ins. Co., 12 Iowa, 126. In Mundine *v.* Pitts, 14 Ala. 84, the court held that notice to an agent or counsel when he is engaged in another business at another time will not be constructive notice to his principal or client *employing him afterwards*. See also, to the same effect, Pepper *v.* George, 51 Ala. 190; Plympton *v.* Preston, 4 La. An. 356; Musser *v.* Hyde, 2 W. & S. (Penn.) 314; Bracken *v.* Miller, 4 id. 102; Bank of United States *v.* Davis, 2 Hill (N. Y.), 452; New York Central Ins. Co. *v.* Protection Ins Co., 20 Barb. (N. Y.) 468; United States Ins. Co. *v.* Shriver, 3 Md. Ch. 381; Miller v. Illinois Central R. R. Co., 24 Barb. (N. Y.) 312; Winchester *v.* Baltimore, etc., R. R. Co., 4 Md. 231; General Ins. Co. of Maryland *v.* United States Ins. Co. of Baltimore, 10 Md. 517; Commercial

in the Maine case; *but clear and satisfactory proof is required that the facts were so present in the agent's mind.*

Bank *v.* Cunningham, 24 Pick. (Mass.) 270; Washington Bank *v.* Lewis, 22 id. 24. In McComb *v.* Chicago, etc., R. R. Co., 7 Fed. Rep., it was held that an officer of a corporation cannot be made a party to a bill of discovery when he did not derive the information in his official capacity. In National Bank *v.* Norton, 1 Hill (N. Y.), 572, it was held that notice of dissolution of a partnership, published in a newspaper, and thus accidentally reaching one of several directors of a bank, is not equivalent to actual notice to the bank. COWEN, J., said: "He happened to know the fact of dissolution, as a director or other corporator may do, without perhaps being aware that the bank could be prejudiced by it. Not having any intimation that it was material, it is too much, even if the point were in the case, to insist on a presumption that he ever communicated the fact to the board. Not having acquired the knowledge as director, there is no room for presumption either on the ground of duty or intent." In Bank of United States *v.* Davis, 2 Hill (N. Y.), 451, where a bill of exchange was sent to a director of a bank to be discounted for the benefit of the drawer, and the former, who was a member of the board who ordered the discount to be made, received the avails, alleging that the discount was for his own benefit, it was held that the bank was chargeable with knowledge of the fraud. The court said: "The general rule is undisputed that notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is acting for the principal in the course of the very transaction which becomes the subject of the suit; for upon principles of general policy it must be taken for granted that the principal knows whatever the agent knows." "I agree that notice to a director, or knowledge derived by him while not engaged officially in the business of the bank, cannot and should not operate to the prejudice of the latter. This is clear from the ground and reason upon which the doctrine of notice to the principal through the agent rests. The principal is chargeable with this knowledge for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions." North River Bank *v.* Aymar, 3 Hill (N. Y.), 262, 275; Fulton Bank *v.* New York & Sharon Canal Co., 4 Paige Ch. (N. Y.) 127. In La Farge Ins. Co. *v.* Bell, 22 Barb. (N. Y.) 54, it was held that an insurance company taking mortgages subsequent in date to an unrecorded deed of the same premises is not chargeable with constructive notice of such deed from the fact that the grantor and mortgagor was at the date of both deed and mortgage a director in the insurance company. The court said: "If his position as a director could make him the agent, or rather identify him entirely with the plaintiffs in such sort as to charge them with constructive notice of all the facts with which he was personally acquainted, as to the title to lands in which they had any interest, in any case, it cannot be so when he did not become concerned as their especial agent or transact business in their behalf.

How is the fact to be established? If by the oath of the agent, and he states that the fact *was present in*

Most clearly it cannot be the case where the facts concerned his own private affairs, and the transaction was one in which he was dealing with the company as a third party on his own behalf, and acting for himself with and against them." In General Ins. Co. *v.* United States Ins. Co., 10 Md. 517, it was held that notice given to a director of a corporation, privately, or which he acquires from rumor, or through channels open to all alike, and which he does not communicate to his associates at the board, will not bind the corporation. In Farmers and Citizens' Bank *v.* Payne, 25 Conn. 444, it was held that the knowledge of a bank director, as to the object for which commercial paper was delivered to a party offering it to the bank for discount, the director not being present when it was offered and discounted, and not having communicated his knowledge to any other director or officer, was not notice to the bank. The court said: "The general rule on this subject is that notice of a fact to an agent is notice to the principal if the agent has knowledge of it while he is acting for the principal in the course of the transaction which is in question. And this rule is applicable equally to corporations and natural persons. Hence, knowledge of a material fact, imparted by a director of a bank to the board of directors at a regular meeting of them, is obviously notice to the bank. It has also been decided in some cases, that notice to either of the directors, while engaged in the business of the bank, is notice to the bank. Whether, however, the knowledge of a director who is present at a meeting of a board of directors when paper is discounted, on his application and for his benefit, is, under the rule which has been stated, to be imputed to the bank, is a question on which there is a diversity of opinion, but one which it is unnecessary here to determine. Whether such knowledge should be treated as notice to the bank in that case would probably depend on the question whether the director should be deemed to have been acting as a director and in behalf of the bank when the transaction took place." In Farrell Foundry *v.* Dart, 26 id. 376, where a defective deed had been recorded, and a director of a corporation not acting as an agent thereof, and having no management of its business otherwise than as director, went to the town records to ascertain the situation of the land, and there saw the record of the deed, but did not inform the corporation or any of its agents, it was held that the corporation was not by reason of these facts chargeable with knowledge of the deed. Louisiana State Bank *v.* Senecal, 13 La. 525. In Housatonic Bank *v.* Martin, 1 Met. (Mass.) 294, it was held that knowledge of facts by a mere stockholder in an incorporated manufacturing company or bank is not notice to the corporation of the existence of those facts. In Smith *v.* South Royalton Bank, 32 Vt. 341, it was held that if a bank director acts in behalf of the bank in a transaction of which the bank takes the benefit, notice to the director at the time of any fact material to the transaction is notice to the bank. In Houseman *v.* Girard Mut. B. & L. Association, 81 Penn. St. 256, L., desiring a loan from plaintiffs, to be

his mind, but that he did not communicate it to the principal, then the principal is made to suffer for the negligence

secured by mortgage on his property, plaintiffs' conveyancer ordered searches for liens; through L. he procured a certificate from the recorder that there were no mortgages on the property; on this the loan was made. There being prior mortgages given by L., not certified, on the sale of L.'s property by the sheriff the proceeds did not reach to pay the loan. It was held that the recorder was liable to the plaintiffs for the loss, and the employment of L. to procure the certificate did not affect the plaintiffs with his knowledge. The court said: "It is urged that by the employment of the owner as the agent for this purpose the defendants are affected with this knowledge of the existence of the mortgage which was omitted in the certificate. This is a very familiar principle and well settled. But it is equally well settled that the principal is only to be affected by knowledge acquired in the course of the business in which the agent was employed. This limitation of the rule is perfectly well established by our own cases, and it it not necessary to look further. Hood *v.* Fahnestock, 8 Watts (Penn.), 489; Bracken *v.* Miller, 4 W. & S. (Penn.) 110; Martin *v.* Jackson, 27 Penn. St. 508. It is a mistake to suppose that it depends upon the reason that no man can be supposed to always carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind at the time, the rule is different. It may support the reasonableness of the rule to consider that the memory of men is fallible in the very best, and varies in different men. But the true reason of the limitation is a technical one, that it is only during the agency that the agent represents and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be. Knowledge can be no better than direct actual notice. It was incumbent on the plaintiff to show that the knowledge of the agent, to use the accurate language of one of our cases, 'was gained in the transaction in which he was employed.' There was not only no evidence of this offer by the plaintiff, but it was plain that it had been gained before, and in an entirely different transaction." See also Farrington *v.* Woodward, 82 id. 259. In Willis *v.* Vallette, 4 Met. (Ky.) 186, it was held that notice to an agent is constructive notice to his principal only when acquired in the course of the transaction in which he is acting as agent. To the same effect, Howard Ins. Co. *v.* Halsey, 8 N. Y. 271. In McCormick *v.* Wheeler, 36 Ill. 114, it was held that a party cannot be charged with notice of facts within the knowledge of his attorney, of which the latter acquired knowledge while acting as attorney for another person. The court said: "The English courts have recently manifested a disposition to depart from this rule, but we deem it a principle just in itself, and founded on wise considerations of policy." In Ford *v.* French, 72 Mo. 250, it was briefly held that the knowledge acquired by an attorney while acting for one client will not affect another client, for whom he is acting at the same time in a different case. But on the other hand: In Donald *v.* Beals, 57

or fraud of his agent as to matters occurring before his agency commenced, and when he had no possible reason

Cal. 399, two mortgages, one to D. and one to N., were deposited in a county clerk's office for record, April 15, the one to D. at four o'clock, and the one to N. at five o'clock. By a clerical mistake it was noted on the D. mortgage that it was deposited on April 18. This mistake occurred in the record book and in the certificate annexed to the mortgage. N. sold and assigned her mortgage to C., who employed an attorney to examine as to the character of the security. C. did not examine the record, but his attorney had full knowledge that the mortgage to N. was not prior in record. The attorney acted both for C. and N. It was held that his knowledge was imputable to C. Said the court: "The knowledge of an attorney is the imputed knowledge of his client. It is a well-settled doctrine of English law, that if the agent, at the time of effecting a purchase, have knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby,"— citing Distilled Spirits, 11 Wall. (U. S.) 367. As to the question of notification to a corporation through an agent, the American cases are as follows: In Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, it was held that the circumstance that the indorser of a discounted note was a director of the discounting bank, is not constructive notice to the bank that the note was made for his accommodation. In Washington Bank *v.* Lewis, 22 id. 24, a bank director got possession of a note for discount for the owner, and instead he pledged it to the bank for his own debt. It was held that as he did not act in his capacity of director in procuring the discount, the bank was not affected by his knowledge of the circumstances under which he procured it. The court said: "The argument is, that though Thompson was not the agent of the bank, yet as he was a director, his knowledge of the facts under which the note was procured is the knowledge of the bank. If this argument could be maintained, it would follow that if a director should procure a note to be discounted, by the fraudulent concealment of material facts which he was bound to disclose, or even by false pretenses, the bank would have no remedy. If Thompson had been authorized to discount this note, and did discount it, the argument might hold good. Whatever a director or other agent of a bank may do within the scope of his authority, would bind the bank so as to make them responsible to the person dealt with. But in the present case Thompson was the party applying for the discount, and was not acting as director, nor could he with propriety so act. The courts in this country which have adopted the rule that a principal shall be charged with knowledge of facts obtained by an agent *before* he entered upon his agency, are few, and the reasons given by them for this extraordinary doctrine are not such as will be likely to commend them to other courts." Tagge *v.* Tennessee National Bank, 9 Heisk. (Tenn.) 479; Hart *v.* Farmers' Bank, 33 Vt. 252; Fairfield Savings Bank *v.* Chase, 72 Me. 226; Distilled Spirits, *ante;* Distilled Spirits, 11 Wall. (U. S.) 356. Some Massachusetts cases are some-

to apprehend such consequences, and when there is no possible way of evading them. This rule would make it exceedingly dangerous for corporations or individuals to employ agents at all; and in this country, at least, it has no considerable foothold, and in England the contrary rule was held by its ablest judges.

"Where the counsel comes to have notice of the title in another affair," says the LORD KEEPER,[1] "* * * that shall not be such a notice as to bind the party." "If a counsel or attorney," says LORD HARDWICKE,[2] "is employed to look over a title, and by some other transaction foreign to the business in hand has notice, this shall not effect the purchaser; for if this was not the rule of the court, it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more likely than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind." In the case previously cited from the United States Supreme Court,[3] which seems to be the authority upon which the courts of this country which have adopted this doctrine predicate it,—the court did not undertake to support its position by any line of reasoning, but was satisfied to accept it simply because the English courts had adopted it, which is hardly sufficient to commend the doctrine to the better class of our courts.

Sec. 173. Admissions by Guardians, Nominal Parties to the Record, Executors, Etc.

While admissions made by a party to a suit *in interest* are receivable in evidence against him, yet admissions made by

times cited as sustaining this rule, but upon examination it will be seen that the knowledge imputed to the principal was acquired by the agent during his agency. Security Bank *v.* Cushman, 121 Mass. 490; Lunt *v.* Woodhall, 113 Mass. 391.

[1] Preston *v.* Tubbin, 1 Vern. 287.

[2] Lowther *v.* Carlton, 2 Atk. 242. See also Warrick *v.* Warrick, 3 Atk. 294; Le Neve *v.* Le Neve, 3 id. 646; Street *v.* Whittaker, Barnard, 220; Cross *v.* Smith, 1 M. & S. 545; Hein *v.* Mill, 13 Ves. 113; Mountford *v.* Scott, 3 Madd. 34. But in this case, upon appeal, LORD ELDON made an intimation of a possible exception to this rule, foreshadowing the doctrine we have combated in the text, which has lately been seized upon by the English courts as a pretext for adopting the rule so foreshadowed by him.

[3] Distilled Spirits, *ante*.

a merely *nominal* party are not admissible. Thus, if the assignee of a bond sues the obligor in the name of the original obligee, or if a *cestui que trust* brings an action in the name of his trustee, or if the assignee of any chose in action brings suit thereon in the name of the assignor, as the plaintiff is only nominally so, the real plaintiff is not bound by his admissions, and they are not admissible in evidence against him.[1] And even though a receipt has been given by the

[1] Bent *v.* McKinstry, 4 Minn. 204; Wynne *v.* Glidwell, 17 Ind. 446; Bates *v.* Ableman, 13 Wis. 644; Myers *v.* McKenzie, 26 Ill. 26; Frear *v.* Evertson, 20 John. (N. Y.) 142; Canton *v.* Baldwin, 27 Tex. 572; Lewis *v.* Long, 3 Munf. (Va.) 136; Peck *v.* Crouse, 46 Barb. (N. Y.) 151; Bartlett *v.* Marshall, 2 Bibb (Ky.), 470; Heywood *v.* Reed, 4 Gray (Mass.), 574; Scott *v.* Hall, 6 B. Mon. (Ky.) 285; Palmer *v.* Cassin, 2 Cranch C. Ct. 66; State *v.* Jennings, 10 Ark. 428; Patrick *v.* McWilliams, 23 Ga. 348; Scott *v.* Coleman, 5 Litt. (Ky.) 349; Gillighan *v.* Tebbetts, 33 Me. 360; Cooke *v.* Cooke, 29 Md. 538; Tapley *v.* Forbes, 2 Allen (Mass.), 20; Wing *v.* Bishop, 3 id. 456; Garland *v.* Harrison, 17 Mo. 282; Norton *v.* Woods, 5 Paige (N. Y.), 249; Hanna *v.* Curtis, 1 Barb. (N. Y.) Ch. 263; Wilson *v.* Hanson, 20 N. H. 375; Burroughs *v.* Jenkins, Phill. (N. C.) Eq. 33. The admissions by the assignor of a chose in action, made while he is the owner thereof and before assignment, are evidence against his assignee and all claiming under him. Brown *v.* McGraw, 20 Miss. 267; Gallagher *v.* Williamson, 23 Cal. 331. Where an assignment for the benefit of creditors is attacked as fraudulent, it is competent for the creditors attacking it to prove the declarations of the assignor, made after the assignment was delivered, but before the schedules were made out and attached, and while the assignor was engaged in preparing them Wyckoff *v.* Carr, 8 Mich. 44. The admissions of an insolvent debtor after the sale of his property by the trustee or mortgagee are inadmissible to impeach the title of the purchaser, unless it is shown affirmatively that they were assented to by him, or made in his presence without objection on his part. Sutter *v.* Lackmann, 39 Mo. 91; Johnson *v.* Holdsworth, 4 Dowl. 63; Payne *v.* Rogers, 1 Doug. 407; Manning *v.* Cox, 7 Moore, 617; Innell *v.* Newman, 4 B. & Ald. 419; Hickey *v.* Burt, 7 Taunt. 48; Mantstephen *v.* Brooke, 1 Chitty, 390; Legh *v.* Legh, 1 B. & P. 447. The rule was formerly otherwise in England. Bauerman *v.* Rodenius, 7 T. R. 659; Crails *v.* D'Eth, 7 T. R. 666, n. *b*; and in some of our courts. Plant *v.* McEwen, 4 Conn. 544; Bulkley *v.* Landon, 3 Conn. 76. This rule was predicated upon the ground that, a chose in action not being assignable so as to enable the assignee to sue thereon in his own name, he is bound by the acts and sayings of the assignor. But a contrary view prevails in this country, and the assignee is protected against any dealing between the debtor and assignor, after notice to the former, or any set-off acquired after such notice, though not before, will be found to prevail to its fullest extent, being in some of the States partially

nominal plaintiff, the parties may show that the money has never in fact been paid ;[1] or if in fact paid, that it was paid *after* the assignment.[2] The same rules prevail as to a *prochein amy* or guardian,[3] unless made in good faith, in a pending suit, for the purpose of the trial only, in which case their admissions are binding upon the same principle that the admissions of an attorney would be.

Admissions made by the representative of an estate will bind him in any suit against him in his representative capacity,[4] but they are not evidence against his co-administrators,[5] nor against a special administrator.[6] Where they relate to acts done by him, or of which he has full control in his rep-

sanctioned by statute, as well as the authority of their courts. Welch *v.* Mandeville, 1 Wheat. (U. S.) 233; Mandeville *v.* Welch, 5 id. 277; Corser *v.* Craig, 1 Wash. (U. S. C. C.) 424; Bholen *v.* Cleveland, 5 Mas. (U. S. C. C.) 174; Green *v.* Darling, 5 Mas. (U. S. C. C.) 201; Wistar *v.* Walker, 2 Browne (Penn.), 166; McCullum *v.* Coxe, 1 Dall. (U. S.) 139; Field *v.* Biddle, 2 Dall. (U. S.) 172, note; Steele *v.* The Phœnix Ins. Co., 3 Binn. (Penn.) 306; Canby *v.* Ridgway, 1 Binn. (Penn.) 496; Wheeler *v.* Hughes, 1 Dall. (U. S.) 23; Ingles *v.* Ingles' Ex'rs, 2 Dall. (U. S.) 49; Rundle *v.* Ettwein, 2 Yeates (Penn.), 23; Solomon *v.* Kimmel, 5 Binn. (Penn.) 232; Bury *v.* Hartman, 4 Serg. & Rawle, 177; Brindle *v.* McIlvaine, 9 Serg. & Rawle, 72; Buchanan *v.* Taylor, Addis. (Penn.) 155; Aldricks *v.* Higgins, 16 Serg. & Rawle, 212; Boulden *v.* Hebel, 17 Serg. & Rawle, 312; Metzgar *v.* Metzgar, 1 Rawle (Penn.), 227; Stevens *v.* Stevens, Ashm. (Penn.) 190; Perkins *v.* Parker, 1 Mass. 117; Andrews *v.* Herring, 5 Mass. 210; Boylston *v.* Boylston, 8 Mass. 465; Dawes *v.* Boylston, 9 Mass. 337; Crocker *v.* Whitney, 10 Mass. 316; Jones *v.* Witter, 13 Mass. 304; Sergent *v.* Essex Ry. Corp., 9 Pick. (Mass.) 202; Farr *v.* Hemmingway, 2 Const. Rep. (S. C.) 753; Wadsworth *v.* Griswold, 1 Harp. (S. C.) 17; Stoney *v.* McNeil, 1 Harp. (S. C.) 156; Smith *v.* Lyons, 1 Harp. (S. C.) 334; Ware *v.* Key, 2 McCord (S. C.), 373; Strong *v.* Strong, 2 Aik. (Vt.) 373; Lampson *v.* Fletcher, 1 Vt. 168; Tichout *v.* Cilly, 3 Vt. 415; Clark *v.* Rogers, 2 Me. 143; Robbins *v.* Bacon, 3 id. 346.

[1] Wallace *v.* Kelsall, 7 M. & W. 273.

[2] Mandeville *v.* Welch, 5 Wheat. (U. S.) 277; Welch *v.* Mandeville, 1 Wheat. (U. S.) 233.

[3] Because they are officers of the court appointed to look after the interests of the ward. Sinclair *v.* Sinclair, 13 M. & W. 640; Webb *v.* Smith, Ry. & M. 106; Cowling *v.* Ely, 2 Starkie, 366; Morgan *v.* Thorne, 7 M. & W. 408.

[4] Heywood *v.* Heywood, 10 Allen (Mass.), 105; Emerson *v.* Emerson, 16 Mass. 429; Wilson *v.* Terry, 9 Allen (Mass.), 214; Haleyburton *v.* Kershaw, 3 Dessau. (S. C.) 105; Allen *v.* Allen, 26 Mo. 327.

[5] Walkup *v.* Pratt, 5 H. & J. (Md.) 53.

[6] Rush *v.* Peacock, 2 M. & R. 162.

resentative capacity, which become material to be shown, they may be shown to affect the estate; but as a rule, where they relate to matters in which he had no part, they cannot be shown to affect the estate, even when made in a bill in equity.[1] But the declarations of an executor, a party to the record, who is also a legatee under the will, may go to the jury upon the trial of a *caveat* to the will;[2] but if he has no interest under the will, his declarations are not admissible upon the question of its validity.[3] The declarations or admissions of the decedent are, in a proper case, admissible against the estate,[4] but not for it, unless they form a part of the *res gestæ*.[5]

Sec. 174. Admissions by Privies.

Where there is a privity of interest between parties, the admissions of one are, in a proper case, evidence against the other, and where there is a mutual or successive relationship to the same right between the parties, there is a privity of interest, and these are classified as privies in estate, in blood, by law, and by representation. Privity of estate exists where the parties are identified in interest as lessors and lessees, donors and donees, joint tenants, etc., and the rule admitting the admissions of one privy in estate against another, is never extended beyond this identity of interest. Privies in blood embrace heirs, ancestors, and coparceners. Privies by representation comprise executors and testators and administrators and intestates. Privity in law arises where the law, without privity of blood, takes an estate from one and bestows it on another.[6] The rules admitting this class of

[1] Fellows *v.* Fellows, 37 N. H. 75; Crandall *v.* Gallup, 12 Conn. 365; Elwood *v.* Diefendorf, 5 Barb. (N. Y.) 398; Dent *v.* Dent, 3 Gill. (Md.) 482; Marshall *v.* Adams, 11 Ill. 37.

[2] Williamson *v.* Nabers, 14 Ga. 286; Peeples *v.* Stevens, 8 Rich. (S. C.) 398.

[3] Roberts *v.* Trawick, 13 Ala. 68.

[4] Hale *v.* Monroe, 28 Md. 98; Malann *v.* Ammon, 1 Grant (Penn.), 126; Boone *v.* Thompson, 17 Tex. 605; Gardner *v.* Heffley, 49 Penn. St. 163; Burckmyer *v.* Mairs, Riley (S. C.), 208.

[5] Cramer *v.* Pinckney, 3 Barb. (N. Y.) Ch. 466; Wilson *v.* Wilson, 6 Mich. 9; Perry *v.* Roberts, 17 Mo. 36; Whitfield *v.* Whitfield, 40 Miss. 352.

[6] Co. Litt. 271 *a*; Beverly's Case, 4 Coke, 123; Carver *v.* Jackson, 4 Pet. (U. S.) 183.

evidence are analogous to those which are found in the doctrine of estoppels, and which govern the admissibility of verdicts, judgments, and depositions. Thus, as to privies in blood and privies in law, the declarations of a deceased occupier of land, that he rented it under a certain person, are evidence of that person's seizin against a party claiming as the heir-at-law of such occupier, to explain the nature of the occupation, and to show that it was not adverse.[1] The declarations of an intestate are evidence against his administrator.[2] But in an action by a special administrator, appointed during the absence from the country of the executor named in the will,[3] it was held that the declarations of the latter, made by him while he was the acting executor, were not admissible against the plaintiff.[4]

In reference to admissions made by persons who have been privies in estate with those against whom the admissions are used, the evidence, after their decease, is generally admissible on a different principle, as being a declaration against interest. And when the persons are alive, the evidence may be admissible, in some cases, as explanatory of acts done or forborne, or of the fact of possession. But without reference to either of these principles, it would seem that an admission by a proprietor or occupier possessing any interest would be evidence as to the nature and extent of that interest, against a party who was in privity of estate with him.[5] An answer in chancery is admissible in evidence against a privy in estate,[6]

[1] Human *v.* Pettett, 3 B. & A. 223; Peaceable *v.* Watson, 4 Taunt. 16; Bagaley *v.* Jones, 1 Camp. 367. These points are illustrated by the doctrine concerning the admissibility of verdicts against privies in law and in blood. Locke *v.* Norbonne, 3 Mod. 141; Outram *v.* Morewood, 3 East, 346; Co. Litt. 352 *a*; Com. Dig. tit. Estoppel, B; 3 T. R. 365.

[2] Smith *v.* Smith, 3 N. C. 32. The plaintiff was regarded as claiming under the intestate, though, in fact, he need not have done so. See also Humphreys *v.* Boyce, 1 Mo. & R. 140; Jones *v.* Jones, 21 N. H. 219; Smith *v.* Morgan, 8 Gill (Md.), 133; Harvey *v.* Anderson, 12 Geo. 69; Colgan *v.* Philips, 7 Rich. (S. C.) 3. See Brown *v.* Mailler, 14 N. Y. 118.

[3] Taynton *v.* Hannay, 3 B. & P. 26.

[4] Rush *v.* Peacock, 2 Mo. & R. 162.

[5] Manton *v.* Thrupp, 9 Bing. 41; Walker *v.* Broadstock, 1 Esp. 458; Davies *v.* Pierce, 2 T. R. 53; Doe *v.* Rickerby, 5 Esp. 4; Tindal *v.* Whitrow, 1 C. & P. 22; Pritchard *v.* Jauncey, 8 C. & P. 99.

[6] Sussex *v.* Temple, Ld. Raym. 310. In this case the court went too far in determining that the answer

and a statement in a lease by a landlord has been held admissible against a person who claims under a subsequent lease of the same land.[1]

An admission by a tenant in possession, who is defendant in an action of ejectment, is evidence against a co-defendant, who defends as a landlord.[2]

But it seems that the mere declarations of tenants will not in general be evidence against their reversioners,[3] and the declarations of a former occupier of the defendant's land have been held not to be admissible against the defendant, upon a question whether the plaintiff had an easement in the land.[4]

Although ancient books of survey and ancient maps, when they are not in the nature of public documents, have been in some cases considered as not being legitimate evidence of boundary, even where they might seem upon principle to be receivable upon the ground that the boundary was a matter of public interest and concern; yet this species of evidence is frequently available by way of admission, where there is a privity of estate between the person against whom the survey or map is used and the person directing it to be made. Thus it was held by HOLT, C. J., that if A. be seized of the manors of B. and C., and during his seizin of both he causes a survey to be taken of the manor of B., and afterwards the manor of B. is conveyed to E., and afterwards there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence.[5]

might be read against persons in occupation of property, on proof that it was the reputation of the county that the lands had belonged to the person making the answer.

[1] Crease *v.* Barrett, 1 C., M. & R. 932; Strode *v.* Seaton, 2 Ad. & El. 171.

[2] Mee *v.* Litherland, 4 Ad. & El. 384.

[3] By PATTERSON, J., in Tickle *v.* Brown, 4 Ad. & El. 378.

[4] Scholes *v.* Chadwick, 2 Mo. & R. 507.

[5] Bridgman *v.* Jennings, 1 Ld. Raym. 734; B. N. P. 283; Davies *v.* Pierce, 2 T. R. 43; Allott *v.* Wilkinson, 4 Gwill. 1585; 2 E. & Y. 293. That such a survey is not evidence against a stranger: Anon., 1 Ld. Raym. 734. It has been said that an old map has been allowed in evidence, where it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase. Gilb. Ev. 78.

But as a person cannot be regarded a privy in estate with a subsequent possessor of the estate, except during the time when the estate was in his own possession, it has been held that an answer in chancery, respecting the title to an advowson, filed by one who had been formerly seized of the advowson, but who had conveyed it away twenty years before the answer, was not admissible against a person claiming the advowson through him.[1] And admissions by a mortgagor, made after he had parted with his interest by a settlement, have been held not to be admissible on behalf of a mortgagee, to show that the money had actually been advanced on the mortgage, the mortgagee seeking to avoid the settlement as being voluntary.[2]

Sec. 175. Rule applicable in Cases of Personalty.

This rule as to privity of estate is generally applied to cases of real property, but the principle is equally applicable in matters relating to personalty, where an identity of interest exists; and where a chattel or a personal contract has been assigned, the declarations of the assignor are generally admissible against the assignee. Thus it has been held, upon an issue between two persons, whether a third person died possessed of certain personal property, that evidence might be given of a declaration, made by that third person, that he had assigned the property, the party against whom the declarations were adduced claiming under that person.[3]

[1] Gully *v.* Exeter, 5 Bing. 171.

[2] Sweetland *v.* Webber, 1 Ad. & El. 733.

[3] Wilstead *v.* Levy, 1 M. & R. 138; Snelgrove *v.* Martin, 2 M'Cord, 241; Hatch *v.* Dennis, 10 Me. 244; Gibblehouse *v.* Strong, 3 Rawle (Penn.), 437; Harrison *v.* Vallance, 1 Bing. 45. Ivat *v.* Finch, 1 Taunt. 141, was an action of trespass for taking three mares, the property of the plaintiff. The defendant who was lord of the manor, justified under a heriot custom; and the sole question between the parties was, whether one Alice Watson, the tenant, was possessed of the mares at the time of her death. The plaintiff contended that she had given them to him some time before, and tendered in evidence her declarations to that effect. These were rejected at the trial, but the court above held that they were admissible, as they were against her interest, and the right of the lord depended upon her title. But where the fact of this dependence is not directly raised by the issue, such declarations will be inadmissible; and in Stotherd *v.* James, 1 C. & K. 121, where an issue was directed to try, whether goods seized in A.'s house

But where the question was whether certain goods which had been seized under a *fi. fa.* against A. were his property, or the property of the plaintiff, who claimed under a sale; and in order to show that the sale was fraudulent, it was proposed to give in evidence a statement made by A. when the execution went in, and while he remained in possession,

at the suit of the defendant were the property of the plaintiff, the declarations of A. respecting the property were held to be inadmissible, inasmuch as on that narrow issue the defendant would succeed, whether the goods belonged to A. or to any other person besides the plaintiff. Had the issue raised the question, whether the goods belonged to A. at the time of the execution, it would seem, on principle, that his declarations made before the seizure would have been evidence against the defendant; although in Prosser *v.* Gwillim, 1 C. & K. 95, on an issue similar to that which was raised in Stotherd *v.* James, WIGHTMAN, J., rejected the debtor's admissions, on the ground that the execution creditor claimed *adversely* to him.

These admissions by third persons, as they derive their value and legal force from the relation of the party making them to the property in question, may be *proved by any competent witness* who heard them, without calling the party by whom they were made. The question is, whether he made the admission, and not merely whether the fact is as he admitted it to be. Its truth, where th admission is not conclusive (and it seldom is so), may be controverted by other testimony, even by calling the party himself, when competent; but it is not necessary to produce him, his declarations, when admissible at all, being received as original evidence, and not as hearsay. Woolway *v.* Rowe, 1 Ad. & El. 114; Brickell *v.* Hulse, 7 Ad. & El. 454. *The time and circumstances* of the admission are to be considered, and whenever the declarations of a third person are offered in evidence, on the ground that the party against whom they are tendered derives his title from such person, it must be shown that they were made at a time when the declarant had an interest in the property in question; because it is manifestly unjust, that a person, who has parted with his interest in property, should be empowered to divest the right of another claiming under him, by any statement which he may choose to make. Doe *v.* Webber, 1 Ad. & El. 740. Thus, the admission of a former party to a bill of exchange, made after he has negotiated it, cannot, under any circumstances, be received against the holder. Pocock *v.* Billing, 2 Bing. 269; Shaw *v.* Broom, 4 D. & R. 730; Roberts *v.* Justice, 1 C. & K. 93. And where a person had, by a voluntary postnuptial settlement, conveyed away his interest in an estate, and afterwards had executed a mortgage of the same property, it was held that his admission that money had actually been advanced upon the mortgage could not be received on behalf of the mortgagee, who was seeking to set aside the former settlement as voluntary and void. Doe *v.* Webber, 1 Ad. & El. 733; Gully *v.* Exeter, 5 Bing. 171.

it was ruled that the evidence was not receivable.[1] So upon the trial of an issue, directed to ascertain whether certain goods which had been seized by the sheriff under a *fi. fa.* against a third party, at the suit of the defendant, were the goods of the plaintiff, who claimed them under an assignment, it was held by WIGHTMAN, J., that a statement, made by the third party before the execution went in, was not admissible on behalf of the plaintiff, as the execution creditor did not claim under the third party, but adversely to him.[2] And upon a similar issue, MAULE, J., rejected the declarations of the debtor as to the property in the goods, upon the ground that, if they did not belong to the plaintiff, the defendant would succeed on the issue, whether they belonged to the debtor or to any other person except the plaintiff.[3] An admission by a person who takes a bankrupt's goods in execution, that he knew an act of bankruptcy had been committed, is not evidence against the person who takes the goods by assignment from the sheriff, where the admission is subsequent to the assignment.[4] As to admissions by persons in possession of chattels or negotiable securities being evidence against subsequent holders, which may be thought analogous to admissions by privies in estate, it appears to be a rule, that *where a person must recover through the title of another, he is bound by the declaration of the party through whom he claims.* Thus, if a person bring an action upon a bill of exchange, the declaration of a person who, at the time when such declaration was made, was holder of the bill, and who had not parted with it till after it was due, is evidence against the plaintiff, being made by one according to whose title his own must stand or fall.[5] So in an action by the indorsee against the acceptor, where the defense is that the bill was obtained by fraud, declarations of the drawer to that effect are admissible, if it can be shown that the plaintiff was privy to the fraud.[6]

[1] Roberts *v.* Justice, 1 C. & K. 93.

[2] Prosser *v.* Gwillim, 1 C. & K. 95.

[3] Stothert *v.* James, 1 C. & K. 121.

[4] Deady *v.* Harrison, 1 Stark. R. 60.

[5] Benson *v.* Marshall, cited in Shaw *v.* Broom, 4 D. & R. 731. See also Beauchamp *v.* Parry, 1 B. & Ad. 89.

[6] Peckham *v.* Potter, 1 C. & P. 232.

But it seems that the analogy with respect to the admissions of privies in estate is not adhered to where the title to negotiable instruments is derived from persons who have made admissions, but where there is not any existing identity of interest. In such cases, the right of a person holding by a good title is not to be cut down by the acknowledgment of a former holder that he had no title. Thus, in an action by the indorsee against the maker of a promissory note payable with interest on demand, the declarations made by the payee, whilst the note was in his possession, to the effect that he gave no consideration for it to the maker, were held inadmissible for the defendant, on the ground that the plaintiff could not be identified with the payee, the bill not being overdue at the time of the indorsement.[1] The declarations were not those of a person holding the negotiable security under the same circumstances as the party to the action. It has been held[2] that as the indorsee of a promissory note does not claim by the title of the indorser, but has a title of his own as indorsee, he ought not to be affected by any declarations of the indorser,—the note not being taken without consideration, or after it was due,—notwithstanding the declarations were made whilst the indorser was in possession of the note. But where it appears that the indorsee is merely the agent to sue for the indorser, the declarations of the latter, whilst he was holder, are evidence against the former.[3]

[1] Barough *v.* White, 4 B. & C. 325; explained in Woolway *v.* Rowe, 1 Ad. & El. 116. See also Phillips *v.* Cole, 10 Ad. & El. 106; Smith *v.* De Wruitz, R. & M. 212.

[2] Beauchamp *v.* Parry, 1 B. & A. 89. An exception is there made as to declarations cotemporaneous with the making of an instrument, and the case of Kent *v.* Lowen, 1 Camp. 177, was referred to, where letters from the payee to the maker were admitted, which stated an usurious consideration for the note. It was said that if the declarations had been made as in the case of Kent *v.* Lowen, at the time of the contract, the case might be different. It is to be observed that in Kent *v.* Lowen, the letters were the usurious contract itself, and it can make no difference whether an act consist of oral declarations or not. Some confusion is, however, introduced into the case by Lord Ellenborough stating that evidence of an act done was admissible against persons claiming under those who did the act—whereas the admissibility of the evidence does not appear to depend on the privity of the parties.

[3] Welstead *v.* Levy, 1 Mo. & R. 138; Harrison v. Vallance, 1 Bing. 45.

Admissions respecting the subject-matter of a cause, by a person who at the time of making them had the same interest in such matter as one of the parties to the cause, are admissible in evidence against that party, though the person who made the admissions is alive and might be called as a witness.[1] The same rule applies to admissions of agents, which are receivable in evidence against principals, as being binding upon them. There might seem to be some reason for a distinction between the rule respecting agents, and that which relates to declarations against interest, inasmuch as in the latter case the party to the suit is to be affected by the declarations of a person with whom he had no community of interest, and for whose assertion he is not responsible.

Sec. 176. Principal and Surety.

It is a general rule, founded on principles of justice in regard to the relation of principal and surety, that the surety ought not to be affected by an admission made by his principal, although he may be affected by declarations or statements made by the principal *when they are connected with the business in respect of which the surety becomes bound, and are made by the principal at the time of transacting that business;*[2] and this is the rule, although the surety was not present.[3] Thus, where a person had become surety by a bond for the faithful conduct of a clerk, it was held, in an action upon the bond, that an admission by the clerk, made after he was discharged, of various sums which he had embezzled,

[1] Woolway *v.* Rowe, 1 Ad. & El. 114; Brickell *v.* Hulse, 7 Ad. & El. 454.

[2] Bondurant *v.* Bank, 7 Ala. 830; Com. *v.* Kendig, 2 Penn. St. 448; Dunn *v.* Slee, Holt, 401. Nor is a surety affected by a judgment recovered against his principal, adjudging him to have been guilty of fraud and misconduct as a general guardian, the surety not having been a party to the suit. Clark *v.* Montgomery, 23 Barb. 464; Douglass *v.* Howland, 24 Wend. (N. Y.) 35–58; Coan *v.* Osgood, 15 Barb. (N. Y.) 583; Snell *v* Allen, 1 Swan (Tenn.), 208. In an Alabama case it was held that the principal's admission is not admissible against his surety unless it is a part of the *res gestæ*. Walker *v.* Forbes, 25 Ala. 139; Blair *v.* Inslea, 10 Mo. 559.

[3] Chapel *v.* Washburn, 11 Ind. 393.

was not receivable in evidence against the surety.[1] But in debt against a surety for his principal's embezzlement the indictment drawn up by the plaintiff's attorney is admissible to show what was claimed to be embezzled.[2] So, in an action upon a guaranty to pay for goods sold and delivered to a third person, what such person has admitted respecting the delivery of the goods is not evidence to charge the person giving the guaranty.[3]

Entries made by a deceased person in the course of duty, or by which he has charged himself with the receipt of money, being admissible as against all the world,[4] are of course evidence against a person who has become his surety that he would keep his accounts faithfully.[5]

The admissions of a principal are admissible to affect his own liability, although his sureties are parties defendant in the suit.

The statement of a constable, when presenting a note to the maker for payment, that the note was in his hands for collection, is admissible in evidence against the sureties of the constable, in an action to recover for a failure by the constable to pay over the money collected on the note.[7]

In an action against a surety the admissions and declarations of the principal, who had deceased, made against his interest, at a time when he could have had no motive to mis-

[1] Smith *v.* Whittingham, 6 C. & P. 78. In Cutler *v.* Newlin, Manning's Dig. N. P. 137, on the execution of a writ of inquiry on an indemnity bond, an admission by the principal of the amount of damnification was considered by Holroyd, J., inadmissible. In Perchard *v.* Hamilton, 1 Esp. 394, which was an action by a sheriff upon a bond to indemnify him against defaults of his bailiff, a written admission by the bailiff of having received levy money was held by Lord Kenyon, C. J., to be admissible against the defendant. It was so ruled by him on the ground that the bailiff was in fact the defendant in the action; but there seems to have been no evidence to show that the defendant was indemnified by the bailiff; and as the bailiff was alive, it would appear that he might have been called as a witness.

[2] Fireman's Ins. Co. *v.* McMillan, 29 Ala. 148.

[3] Evans *v.* Beattie, 5 Esp. 26.

[4] Gleadow *v.* Atkin, 1 C. & M. 423.

[5] Goss *v.* Watlington, 3 B. & B. 132; Whitnash *v.* George, 8 B. & C. 556; Middleton *v.* Melton, 10 B. & C. 317; McGahey *v.* Alston, 2 M. & W. 206.

[6] Hackleman *v.* Moat, 4 Blackf. (Ind.) 164.

[7] State *v.* Grupe, 36 Mo. 365.

represent, and in relation to facts with which he must have been well acquainted, were held to be evidence against the surety.[1]

Where a bond for performance of the duties of collector of tolls was given to the canal commissioners of New York, bearing date June 1st, with a certificate of the sureties' sufficiency indorsed thereon, by a public officer, under date of June 25th, it was held that the admissions of the commissioners that they presumed the bond was not delivered to them, or accepted by them, until after the certificate of approval was thus indorsed, was not sufficient to repel the legal presumption that the bond was delivered and accepted on the day of its date, when the admission was accompanied with the declaration that they had no recollection as to the time when the bond was delivered.[2] If the evidence as to the time of execution be balanced, the date will be held to be the true time.[3] A cashier of a bank, in a suit against his surety, was charged with having converted to his own use, at specified times, and some time before certain declarations offered in evidence were made, several sums of money belonging to the plaintiff. These facts constituted the breach of the bond relied on in the suit against the surety, and were the facts in issue. It was held that evidence not tending to show what the cashier said or did, or the entries he made *at the time he received and converted the money*, was improperly received against the surety.[4] But in a suit upon a bond against the executor of the principal and his sureties, evidence is admissible of the declarations of the deceased principal that he was in default on the bond.[5] So in a joint action against a cashier and his sureties on his bond, the admissions and declarations of the cashier, as to his defaults, are evidence against the sureties.[6] And in *scire facias* against an indorser of a writ, declarations of the defendant to an officer who is seeking to collect of him the execution issued on the judg-

[1] Hinckley *v.* Davis, 6 N. H. 210.

[2] Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 404.

[3] Allen *v.* Rhodebaugh, Wright (Ohio), 322.

[4] Stetson *v.* City Bank of N. O., 2 Ohio St. 167.

[5] Mahaska *v.* Ingalls, 16 Iowa, 81.

[6] Amherst Bank *v.* Root, 2 Met. (Mass.) 522.

ment in the original suit, are competent.[1] But the admissions of a principal as to his liability to a plaintiff, made after a breach of his contract, are not competent evidence against his surety.[2]

Sec. 177. Offers of Compromise.

Offers of compromise, or offers in the nature of pacification of litigation, expressly or impliedly made without prejudice, upon grounds of public policy, are not admissible in evidence against the party making them.[3] This rule, as was stated by Lord Mansfield, is predicated upon the ground that "it must be permitted to all men to buy their peace, without prejudice to them, should the offer not succeed, such offers being made to stop litigation, without regard to the question whether anything is due or not." If, therefore, the defendant, on being sued for a certain sum, should offer the plaintiff a less sum, and at the same time state that such offer was made without prejudice, such offer is not admissible in evidence, for it is irrelevant to the issue; it neither admits nor ascertains any debt, and is no more than saying he would give a certain sum to be rid of the action.[4] So, in equity, it has been held that the giving of a small sum in order to obtain the release of a right could not be considered as an acknowledgment that a right existed; it amounts only to this — "I give you so much for not seeking to disturb me."[5] Perhaps, also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession,[6] will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appear to have been made under the faith of a pending treaty, into which the party has been led by

[1] Davis *v.* Whitehead, 1 Allen (Mass.), 276.

[2] Cassity *v.* Robinson, 8 B. Mon. (Ky.) 279.

[3] Terry *v.* Taylor, 33 Mo. 323; Perkins *v.* Concord R. R. Co., 44 N. H. 223; State *v.* Dutton, 11 Wis. 373; Rideaut *v.* Newton, 17 N. H. 71; Williams *v.* Thorp, 8 Cow. (N. Y.) 201. But see Grubbs *v.* Nye, 21 Miss. 443; Cory *v.* Bretton, 4 C. & P. 462; Johnson *v.* Sheridan, 2 C. & K. 24; Healey *v.* Thacher, 8 C. & P. 388; Paddock *v.* Forrester, 3 Scott, 724.

[4] B. N. P. 236, *b*.

[5] Underwood *v.* Courtown, 2 Sch. & Lef. 67, 68.

[6] Thomson *v.* Austen, 2 D. & Ry. 361.

the confidence of an arrangement being effected,[1] although, in this case, if the admission is merely of a collateral or indifferent fact, such as the handwriting of a party, which is capable of easy proof by other means, and is not connected with the substantial merits of the cause, it will be received ;[2] but evidence of the admission of any independent fact is receivable, although made during a treaty of compromise.[3]

In England it is held that, in the absence of any express or strongly implied restriction as to confidence, an offer of compromise is admissible as *some* evidence of liability,[4] and although the offer of a less sum than the amount demanded will not, in general, support a count on an account stated, inasmuch as it may be a mere offer to purchase peace ;[5] nor, perhaps, will an offer by the drawer of a bill, who is threatened with legal proceedings upon it, to give another bill by way of settlement, obviate the necessity of proving at the trial that he has received due notice of dishonor ;[6] yet there are occasions, as where drawer of a bill, whose signature is in issue, has proposed a settlement, when the fact of an offer having been made may be entitled to considerable weight.[7] In one case,[8] where the defendant was sued for keeping mischievous dogs, which had killed three of the plaintiff's cattle, and it appeared that on being told of the injury done by them he had offered to settle for it, the court held that although this was a fact which in strictness should have been submitted to the jury as evidence of the scienter, it was entitled to little, if any, weight, "as it might have been made from motives of charity without any admission of liability at all." They therefore refused a new trial, although the question, whether the offer of compromise was not an admission of the defend-

[1] Waldridge *v.* Kennison, 1 Esp. 144.

[2] Id.

[3] Mount *v.* Bogert, Anthon (N. Y.), 190 ; Murray *v.* Coster, 4 Cow. 635 ; Fuller *v.* Hampton, 5 (N. Y.) Conn. 416, 426 ; Sanborn *v.* Neilson, 4 N. H. 501 ; Delogny *v.* Rentoul, 1 Martin (La.), 175.

[4] Wallace *v.* Small, M. & M. 464 ; Watts *v.* Lawson, id. 447, n.; Nicholson *v.* Smith, 3 Stark. 129.

[5] Wayman *v.* Hilliard, 7 Bing. 101.

[6] Cuming *v.* French, 2 Camp. 106, note.

[7] Harding *v.* Jones, Tyr. & Gr. 135.

[8] Thomas *v.* Morgan, 2 C., M. & R. 496.

ant's liability had not in point of fact been left to the jury, the attention of the judge not having been drawn to that particular point. Admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual.[1]

In a Maine case,[2] where a town had voted upon two separate occasions to pay a person who made a claim against it for a personal injury received from an insufficient road, which sum was not accepted, it was held that these votes were not receivable as an admission of its liability by the town, being mere offers of compromise. But in a Massachusetts case,[3] where the selectmen of a town, in the course of a conversation had with a person claiming damages for an injury occasioned by a defect in a highway, with a view to a compromise, offered to pay for his loss of time and actual expenses, and asked him what they would amount to, it was held that his statements in reply, of the amount of those items, *if not made as offers upon which he was willing to settle*, were admissible in evidence against him.

In Mississippi it is held that offers of compromise relating to notes may be given in evidence as an admission of the execution of the notes.[4]

Sec. 178. How Admissions should be Weighed.

An important element in determining the force to be given to admissions is *the circumstances under which they were made*. If they were made under constraint or illegal duress, they are not admissible;[5] and the same is also true if they were made by a person under a misapprehension of his legal

[1] Gregory *v.* Howard, 3 Esp. 113; Slack *v.* Buchanan, Peake, 5.

[2] Rawell *v.* Montville, 4 Me. 270.

[3] Harrington *v.* Lincoln, 4 Gray (Mass.), 563.

[4] Grubbs *v.* Nye, 21 Miss. 443. See also Lobach *v.* Hotchkiss, 17 Abb. (N. Y.) Pr. 88, where, in an action against a ship-owner to recover the amount of advances made to compromise a demand for salvage, evidence that the defendant claimed and received from the underwriters his share of the insurance on the basis of an adjustment of general average, which included the advances made by the plaintiff, was held to amount to an admission of the defendant's liability for such advances.

[5] Stockfeth *v.* De Tastet, 4 Camp. 11; Robson *v.* Alexander, 1 M. & P. 448.

rights,[1] especially where such misapprehension was induced by the other party. But admissions made under *legal constraint* are competent evidence in some cases, as, affidavits sworn to in a former suit,[2] and this is the rule, although the facts sworn to were irrelevant,[3] or although the party was not bound to disclose them,[4] and although he had no opportunity of fully explaining what he meant.[5] In the case last cited, in an action for taking the plaintiff's ship, the testimony of the defendant, given as a witness in an action between other parties, in which he admitted the taking of the ship, was allowed to be proved against him; although it appeared that, in giving his evidence, when he was proceeding to state his reasons for taking the ship, the judge stopped him by saying that it was unnecessary for him to vindicate his conduct. The manner in which the evidence was obtained was matter of observation to the jury; but as what was said bore directly on the issue, it could not be excluded as evidence of the fact. So, where a defendant had been examined before commissioners of bankrupts, although the whole of what he said had not been taken down, yet the portion that was reduced to writing having been read over to him, and he having signed it, it was held to be receivable against him, as a statement of facts, the truth of which he had admitted.[6] It seems that an admission obtained under a compulsory examination will not be evidence of an *account stated;* but this probably rests on the ground that it is made to a third party, while, to support an account stated, the admission must be made either to the person to whom the money is owing, or to some one sent by him.[7]

There is no difference, so far as the admissibility of this kind of evidence is concerned, between direct admissions, and those which are *incidental*, or made in some other connection, or involved in the admission of some other fact. Thus, in an action by the assignees of a bankrupt against an auctioneer to recover the proceeds of a sale of the bankrupt's

[1] Moore *v.* Hitchcock, 4 Wend. (N. Y.) 292.

[2] Ashmore *v.* Hardy, 7 C. & P. 501.

[3] Stockfeth *v.* De Tastet, *ante.*

[4] Smith *v.* Bendall, 1 Camp. 30.

[5] Callet *v.* Keith, 4 Esp. 212.

[6] Milward *v.* Forbes, 4 Esp. 171.

[7] Tucker *v.* Barrow, 3 C. & P. 90.

goods, the defendant's advertisement of the sale, in which he described the goods as "the property of D., a bankrupt," was held to be a conclusive admission that D. was a bankrupt, and that the defendant was acting under his assignees.[1] So where a party, with a view to suing out a commission of bankruptcy against a trader, made an affidavit that the trader owed him a certain specific sum, and was become bankrupt, it was held that he could not afterwards dispute the bankruptcy when he was himself sued in trover by the assignees of the bankrupt, appointed under a second commission, for the price of flour which he had clandestinely received from the trader, and applied to the discharge of his own debt.[2]

Sec. 179. Admissions implied from Conduct.

The conduct of a party may be such of itself, unaccompanied by any words or declaration, as to amount to an admission of certain facts. So admissions may be *implied from assumed character;* for, whenever the existence of any domestic, social, or official relation is in issue, any recognition of that relation, whether by word or deed, is *prima facie* evidence, against the person making such recognition, that the relation exists.[3] This general rule, although most frequently applied against a person who has recognized the character or office of another, also embraces, in its principle, any representations or language in regard to himself. Thus, where a person has *assumed to act in an official character*, this is an admission of his appointment or title to the office, so far as to render him liable, even criminally, for misconduct or neglect in such office.[4]

The same rule prevails where a person has *recognized the official character of another*, by dealing with him in such

[1] Maltby *v.* Christie, 1 Esp. 342; Rankin *v.* Horner, 16 East, 193; Taylor on Ev. 533.

[2] Ledbetter *v.* Salt, 4 Bing. 623; Harmar *v.* Davis, 7 Taunt. 577.

[3] Dickinson *v.* Coward, 1 B. & A. 677, 679; Inglis *v.* Spence, 1 C. M. & R. 436.

[4] Bevan *v.* Williams, 3 T. R. 635 *a*; R. *v.* Gardner, 2 Camp. 513; R. *v.* Kerne, 7 How. St. Tr. 714; R. *v.* Brommick, id. 722; R. *v.* Atkins, id. 738; R. *v.* Borrett, 6 C. & P. 124; Cross *v.* Kaye, 6 T. R. 663; Trowbridge *v.* Baker, 1 Cow. (N. Y.) 251; Lister *v.* Priestly, Wightw. 67.

character or otherwise; at least such conduct is *prima facie* evidence of his title against the party thus recognizing it.[1] Thus, were a person had received credit from the renter of turnpike tolls, and had afterwards accounted with him in that character, and made him a partial payment, he was not permitted to question the legality of his appointment; and where a farmer-general of post-horse duties brought an action for certain statute penalties against a person who let out horses for hire, proof of his appointment was waived, the defendant having previously accounted with him as farmer-general.[2] So, the clerk of the trustees of a turnpike road was not allowed to show that a person who had acted as one of the trustees, and had been treated as such by himself, while clerk, was not duly qualified;[3] and in an action by the assignees of a bankrupt against a debtor, who has made them a partial payment,[4] or has acknowledged their title in letters to the solicitor of the commission,[5] the plaintiffs need not prove their title as assignees, though notice to dispute has been given. So, where an attorney brought an action against a defendant for defamation, in charging him with swindling, and threatening to have him struck off the rolls, this threat was held to impart an admission that the plaintiff was an attorney;[6] and in a similar action brought by a physician, where the plaintiff was spoken of as "Doctor L.," and the defendant, who was an apothecary, had made up medicines prescribed by him, the court was equally divided upon the question, whether the defendant's words and conduct amounted to an acknowledgment of the plaintiff's character. In actions of this kind, however, *if the words complained of charge a want of qualification* and not mere misconduct, the plaintiff must prove that he possesses the character which has been impugned, for the slander in such case does not admit it.[7] This rule, or rather exception to the rule, is well illus-

[1] Peacock *v.* Harris, 10 East, 104.

[2] Radford *v.* M'Intosh, 3 T. R. 632.

[3] Prichard *v.* Walker, 3 C. & P. 212.

[4] Dickinson *v.* Coward, 1 B. & A. 677.

[5] Inglis *v.* Spence, 1 C. M. & R. 432; Crofton *v.* Poole, 1 B. & Ad. 568.

[6] Berryman *v.* Wise, 4 T. R. 366.

[7] Smith *v.* Taylor, 1 Scott, 196; Collins *v.* Carnegie, 1 Ad. & El. 703.

trated by an English case.[1] In that case, an action was brought for work and labor as a surgeon; and the defense was that the plaintiff was a physician, and therefore incapable of maintaining an action for fees. It was shown that he had written prescriptions and signed himself M. D., upon which Lord Ellenborough was on the point of nonsuiting him, saying that "if a person passes himself off as a physician, he must take the character *cum onere*. It appearing, however, that the defendant had paid money into court, his Lordship thought that this act removed the objection, being tantamount to an admission of the plaintiff's right to sue as a surgeon. Admissions implied from the *conduct* of a party are governed by the same principles. Thus, the suppression of documents is an admission that their contents were deemed unfavorable to the party suppressing them.[2] The entry of a charge to a particular person in an account book, or the making out of a bill in his name, is an admission that the goods were furnished on his credit.[3] The omission of a claim by an insolvent in a schedule of the debts due to him, given in on oath, is an admission that it is not due; though whether it amounts to a conclusive admission may be a question of some doubt.[4] Payment of money is an admission that the person to whom it was paid is the proper person to receive it, but not against the receiver that the payer was the person who was bound to pay it; for the party receiving payment of a just demand may well assume without inquiry that the person tendering the money was the person legally bound to pay it.[5] Relief given at various times to a pauper while residing in another parish is cogent, though not con-

[1] Lipscombe *v.* Holmes, 2 Camp. 441; R. *v.* Barnes, 1 Stark. 243; Cummin *v.* Smith, 2 S. & R. (Penn.) 440; Divoll *v.* Leadbetter, 4 Pick. (Mass.) 220.

[2] James *v.* Bion, and Owen *v.* Flack, 2 S. & S. 606, 607; Bell *v.* Frankis, 4 M. & G. 446; Curlewis *v.* Corfield, 1 Q. B. 814.

[3] Storr *v.* Scott, 6 C. & P. 241; Thompson *v.* Davenport, 9 B. & C. 78.

[4] In Nicholls *v.* Downes, 1 M. & R. 13, Lord Tenterden held it to be conclusive, apparently questioning Hart *v.* Newman, 3 Camp. 13, where Lord Ellenborough treated it as entitled to little weight. See Tilghman *v.* Fisher, 9 Watts (Penn.), 441.

[5] James *v.* Bion, 2 S. & S. 606; Chapman *v.* Beard, 3 Anstr. 942.

clusive, evidence that he is settled in the relieving parish ;[1] and even a single instance of such relief having been given will warrant a similar conclusion.[2] Of course the effect of such evidence will be much stronger if the examination states a distinct head of settlement in the relieving parish, though the technical proof may fail to establish it satisfactorily.[3] On the other hand, the relief of a pauper, while residing in the relieving parish, is no evidence whatever of a settlement, however frequently it may have been bestowed ;[4] but this rule rests, not so much on the absence of any presumption deducible from the conduct of the relieving parish, as on the impolicy of permitting such evidence to have any weight ; for if parish officers, by giving relief to a pauper, were to make evidence against themselves as to his settlement in their parish, they would perform their duty to casual poor with great reluctance.[5] A distinct promise by the drawer to pay, or indeed any acknowledgment by him of liability upon, a dishonored bill, will raise an inference that he has received due notice of dishonor, and, in the case of a foreign bill, that it has been duly protested ;[6] and a jury will be justified in coming to the same conclusion on less positive evidence ; as, for instance, if the drawer, in disclaiming liability, when threatened with an action, did not rest his defense on the want of notice, but on some different ground.[7] The maxim, *expressum facit cessare tacitum*, will here raise a presumption which a defendant may find it difficult to rebut. Suing[8] or distraining[9] for rent, accruing due after a forfeiture of which the lessor has notice, as also the mere ac-

[1] R. *v.* Barnsley, 1 M. & Sel. 377 ; R. *v.* Wakefield, 5 East, 335 ; R. *v.* Stanley, 15 East, 350 ; R. *v.* East, Winch., 12 A. & E. 697 ; R. *v.* Yarwell, 9 B. & C. 894 ; R. *v.* Carnarvonshire Js., 2 Q. B. 325.

[2] R. *v.* Edwinstowe, 8 B. & C. 671.

[3] R. *v.* Bedingham, 1 Sess. Cas. 114.

[4] R. *v.* Chatham, 8 East, 498 ; R. *v.* Trowbridge, 7 B. & C. 252 ; R. *v.* Coleorton, 1 B. & Ad. 25.

[5] R. *v.* Chatham, 8 East, 501 ; R. *v.* Coleorton, 1 B. & Ad. 27.

[6] Hicks *v.* Duke of Beaufort, 4 Bing. N. C. 229, 232 ; Campbell *v.* Webster, 2 C. B. 258 ; Patterson *v.* Becher, 6 B. Moore, 319 ; Brownell *v.* Bonney, 1 Q. B. 39. See Bell *v.* Frankis, 4 M. & G. 446.

[7] Wilkins *v.* Jadis, 1 M. & Rob. 41 ; Curlewis *v.* Corfield, 1 Q. B. 814.

[8] Roe *v.* Minshall, cited B. N. P. 96 *c*.

[9] Doe *v.* Peck, 1 B. & Ad. 428.

ceptance of such rent, amounts to an acknowledgment of the tenancy on the part of the lessor, and is consequently a waiver of the forfeiture;[1] although the breach is a continuing one, as the using of rooms in a prohibited manner, or the omitting to keep premises insured, the acceptance of rent after such breach does not amount to a waiver of the forfeiture incurred by subsequent user or omission.[2]

Sec. 180. Admissions from Acquiescence.

Admissions may be implied from the *acquiescence* of the party. *But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party.*[3] And whether it is acquiescence in the conduct or in the language of others, *it must plainly appear that such conduct was fully known, or such language fully understood, by the party,* before any inference can be drawn from his passiveness or silence. So *the circumstances must have been such as not only afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated.*[4] Thus, where a landlord quietly suffers a tenant to expend money in making alterations and improvements on the premises, it is evidence of his consent to the alterations;[5] but merely lying by and passively witnessing a breach of covenant for several years is not such an acquiescence as amounts to a waiver of the forfeiture.[6] If a tenant *personally* receives notice to quit at a particular day, without objection, it is generally an admission that his tenancy expires

[1] Doe *v.* Davids, 2 Cowp. 804; Roe *v.* Harrison, 2 T. R. 430; Doe *v.* Allen, 3 Taunt. 78; Doe *v.* Rees, 4 Bing. N. C. 384.

[2] Doe *v.* Woodbridge, 9 B. & C. 376; Doe *v.* Peck, 1 B. & Ad. 428; Hyde *v.* Watts, 12 M. & W. 254; Doe *v.* Gladwin, 6 Q. B. 963.

[3] Allen *v.* McKeen, 1 Sum. (U. S.) 314; People *v.* McCrea, 32 Cal. 98; Black *v.* Hicks, 27 Ga. 522; Corser *v.* Paul, 41 N. H. 24; Hagenbaugh *v.* Crabtree, 33 Ill. 225.

[4] Brainard *v.* Buck, 25 Vt. 573; Hersey *v.* Burton, 23 Vt. 685; Lawson *v.* State, 20 Ala. 65; Wilkins *v.* Stidger, 22 Cal. 231; Ralfe *v.* Ralfe, 10 Ga. 143; Melen *v.* Andrews, M. & M. 336; Boyd *v.* Bolton, 8 Ir. Eq. 113.

[5] Doe *v.* Allen, 3 Taunt. 78, 80; Doe *v.* Pye, 1 Esp. 366; Neale *v.* Parkin, 1 Esp. 229; Stanley *v.* White, 14 East, 332.

[6] Doe *v.* Allen, 3 Taunt. 78.

on that day ;[1] but if he cannot read, or even did not read the notice in the presence of the person serving it upon him, it will be treated as a notice not personally served,[2] and will go for nothing.[3] It has been held that a trader, being inquired for and hearing himself denied, may thereby commit an act of bankruptcy ;[4] and generally, where one knowingly avails himself of another's acts done for his benefit, the jury will be justified in considering such conduct as an admission of his obligation to pay a reasonable compensation.[5]

Raising an objection to one item of an account, no remark being made as to the rest, is evidence of an account stated as to those items, to which no objection has been made ;[6] and, *among merchants*, an account rendered will be regarded as allowed, if it is not objected to within a reasonable time,[7] or at least if it is kept for any length of time without making an objection.[8] With respect to ordinary accounts, however, a distinction has been made between such as are *sent by post*, and those *delivered by hand ;* and it has been held that the former, though kept by the party to whom they were sent without observation, are not admissible against him, as evidence that he had acquiesced in their contents.[9] In the case last cited, BUSH, C. J., said that what a party *says* upon an account furnished to him, or upon a statement made in his presence, may be given in evidence against him along with the account

[1] Doe *v.* Biggs, 2 Taunt. 109 ; Thomas *v.* Thomas, 2 Camp. 647 ; Doe *v.* Forster, 13 East, 405 ; Oakapple *v.* Copous, 4 T. R. 361 ; Doe *v.* Wombwell, 2 Camp. 559.

[2] Doe *v.* Calvert, 2 Camp. 388.

[3] Thomas *v.* Thomas, 2 Camp. 649 ; Doe *v.* Forster, 13 East, 405.

[4] Key *v.* Shaw, 8 Bing. 320.

[5] Morris *v.* Burdett, 1 Camp. 218, where a candidate, not bound by statute to pay for the hustings erected for an election, had made use of them ; Abbot *v* Hermon, 7 Me. 118, where a school-house was used by the school district ; Hayden *v.* Madison, 7 id. 76.

[6] Chisman *v.* Count, 2 M. & G. 307.

[7] Sherman *v.* Sherman, 2 Vern. 276.

[8] Freeland *v.* Heron, 7 Cranch (U. S.), 147, 151 ; Murray *v.* Toland, 3 Johns. Cas. (N. Y.) 575 ; Coe *v.* Hutton, 1 S. & R. (Penn.) 398 ; M'Bride *v.* Watts, 1 M'Cord (S. C.) 384 ; Corps *v.* Robinson, 2 Wash. (U. S.) C. C. 388 ; Willis *v.* Jernegan, 2 Atk. 252, *per* LORD HARDWICKE ; Tickel *v.* Short, 2 Ves. Sen. 239, *per* id., where the account had been kept without objection for two years.

[9] Price *v.* Ramsay, 2 Jebb & S. 338.

or statement, because what is thus offered is the act or declaration of the party to be affected by it, and the account or the statement is by reference made a part of such act or declaration; but the naked fact that an account remains in the possession of a party to whom it was sent, cannot amount to an acquiescence in its contents. The admission of such evidence would countenance the notion that a man might, by furnishing an account claiming a balance against his *creditor*, establish an acquittance for himself.

The *same distinction* has been recognized in England between *letters* and *verbal statements*. "What is said to a man before his face," said LORD TENTERDEN,[1] "he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different, and it is too much to say that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains." LORD DENMAN, in a later case, declared that "it was a great deal too broad a proposition to say that every paper which a man might hold, purporting to charge him with a debt or liability, was evidence against him if he produced it."[2]

Letters, however, or other papers found in a party's possession, will occasionally in a civil suit be evidence against him, as raising an inference that he knows their contents and has acted upon them;[3] and in criminal prosecutions, especially those for conspiracy and treason, letters and papers so found are frequently received, though their weight, as evidence against the prisoner, will in great measure depend on the fact, whether answers to them can be traced, or whether anything can be shown to have been done upon them.[4] So, also, the opportunity of constant access to documents may sometimes, by raising a presumption that their contents are known, afford ground for affecting parties with an implied admission of the truth or correctness of such contents. Thus, the rules of a club, or a record of the proceedings of a society, contained in a book kept by the proper officer and

[1] Fairlie *v.* Denton, 3 C. & P. 103.
[2] Doe *v.* Frankis, 11 A. & E. 795.
[3] Hewitt *v.* Piggott, 5 C. & P. 75.
[4] R. *v.* Horne Tooke, 25 How. St. Tr. 120, 121; R. *v.* Watson, 2 Stark. 140.

accessible to the members;[1] charges against a club, entered by the servants of the house in a book kept for that purpose open in the club-room,[2] and the like, are admissible against the members; their knowledge of the contents of the books and their acquiescence therein being presumable under the circumstances.

As to admissions inferred from *acquiescence in the verbal statements of others*, the maxim, *qui tacet, consentire videtur*, is to be applied with careful discrimination. "Nothing," said DUNCAN, J., "can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be received at all, unless the evidence is of direct declarations of that kind, which naturally calls for contradiction; some assertion made to the party with respect to his right, which by his silence he acquiesces in."[3] A *distinction is made between declarations* made by a *party interested*, and those made *by a stranger;* and while what one party declares to the other without contradiction is admissible, what is said to a party by a third person may not be so. It may be impertinent, and best rebuked by silence.[4] And the same is true as to statements made by strangers in the presence of a party, and they will not be admissible against him if they are *not directly addressed* to him; because, in such case, he cannot generally be called upon to interfere. Therefore, where, in a real action, upon a view of the premises by a jury, one of the chain-bearers was the owner of a neighboring lot, respecting the bounds of which the litigating parties had much altercation, their declarations in his presence were held inadmissible against him, in a subsequent action respecting his own lot.[5] To affect a person with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence, or even to himself, by parties interested, *but they must also have been made on an occasion*

[1] Raggett *v.* Musgrave, 2 C. & P. 556; Alderson *v.* Clay, 1 Stark. 405.

[2] Wiltzie *v.* Adamson, 1 Ph. Ev. 357.

[3] Moore *v.* Smith, 14 S. & R. (Penn) 393.

[4] Child *v.* Grace, 2 C. & P. 193.

[5] Moore *v.* Smith, 14 S. & R. (Penn.) 388.

when a reply from him might be properly expected.[1] Therefore depositions taken in the presence of a party during a judicial investigation, observations made by a magistrate to the parties before him, and confessions of an accomplice criminating his co-prisoner before the justices, will not in any subsequent trial, whether civil or criminal, be evidence against the party who heard them in silence; because in judicial inquiries a regularity of proceeding is adopted, which prevents a person from interfering when and how he pleases, as he naturally would do in a common conversation.[2] The same inferences cannot, therefore, be drawn from his silence or his conduct on such occasions, as might reasonably result from similar behavior, were he under no restraint; and as it is only for the sake of these inferences that the statements of other persons can ever be admitted, they are properly rejected whenever they do not warrant the inferences sought to be drawn from them. If, however, the statement of one person calls for a reply from another, it may then be read in connection with the reply, and is evidence against the party replying, so far as the answer directly or indirectly admits its truth; and it makes no difference in the application of this rule whether the words were spoken by an interested party or a stranger; whether they were addressed or not to the party replying; or whether they fell from the parties, the witnesses or the court, in a judicial proceeding, or were uttered during the course of an ordinary conversation.[3]

But the *silence* of the party is, at best, worth very little as evidence of acquiescence, even where the declarations are addressed to himself, even at a time when he is at full liberty to reply as he thinks fit; and if he has no means of knowing the truth or falsehood of the statement, the fact that he did not in terms deny it is almost valueless.[4] In all these cases,

[1] Boyd *v.* Bolton, 8 Ir. Eq. R. 113.

[2] Melen *v.* Andrews, M. & M. 336; Short *v.* Story, Roscoe Ev. 38; R. *v.* Appleby, 3 Stark. 33; R. *v.* Turner, 1 Moo. C. C. 347, 348; Child *v.* Grace, 2 C. & P. 193.

[3] Child *v.* Grace, 2 C. & P. 193; Jones *v.* Morrell, 1 C. & K. 266; R. *v.* Edmunds, 6 C. & P. 164; Boyd *v.* Bolton, 8 Ir. Eq. 113.

[4] State *v.* Rawls, 2 N. & M'C. (S. C.) 301; Batturs *v.* Sellers, 5 H. & J. (Md.) 117; Hayslep *v.* Gymer, 1 Ad. & El. 165.

it must always be distinctly remembered that it is not the statement made in the party's presence which is evidence against him, *but it is his own conduct in consequence of such statement* which is the sole evidence. A party is always at liberty to show that his admission was founded on a mistake, either of law or fact, unless his opponent has been induced by them to alter his condition.[1]

Sec. 181. Conclusive Admissions.

Conclusive admissions, or those which the party making them cannot deny, are, first, those which are expressly or tacitly made by the pleadings, and secondly, those which have been acted upon by others. In reference to admissions by the pleadings it may be said that a party may, by bringing an action on a contract, estop himself from denying its validity and obligation, in a subsequent action founded thereon, against himself.[2] At all events a party may, by an admission made in one suit, or by omitting to plead, conclusively bind himself thereby if a subsequent action is brought against him for the same cause.[3] But an admission made in the pleadings in one action is not admissible in another, *unless precisely the same matter is being litigated in such other action*.[4] Thus a libel fi'ed by a party to another suit cannot ordinarily be given in evidence against him as an admission; but if he brought the suit as a trustee, and recovered, the *cestuis que trust* may put the whole record in evidence to show the recovery and the title on which it rested.[5] A bill

[1] Hearn *v.* Rogers, 9 B. & C. 577; Newton *v.* Liddard, 12 Q. B. 927; Newton *v.* Belcher, 1 Q. B. 921.

[2] Fishmongers' Co. *v.* Robertson, 5 M. & G. 192.

[3] Skelton *v.* Hawling, 1 Wils. 258; Dawes *v.* McMichael, 6 Paige (N. Y.) Ch. 139; McGowen *v.* Young, 2 Stew. (Ala.) 276.

[4] Carter *v.* James, 13 M. & W. 137; Church *v.* Sheton, 2 Curt. (U. S.) 271; Melvin *v.* Whitney, 13 Pick. (Mass.) 184. But see Cooper *v.* Day, 1 Rich. (S. C.) Eq. 25; Van Rensselaer *v.* Aikin, 22 Wend. (N. Y.) 549; Henderson *v.* Cargill, 31 Miss. 367.

[5] Church *v.* Shelton, *ante*. In Stump *v.* Henry, 6 Md. 201, at a sheriff's sale of real estate under an execution upon a judgment against R., A. B. and C. became purchasers. F. bought the shares of B. and C., agreeing with R. to convey them to him upon payment of the purchase-money. At a trustee's sale, S., by order of the chancellor, purchased all the right of F. and R.

in equity is not evidence against the complainant in a trial at law,[1] nor is a bill brought by an administrator admissible against the estate.[2] So it seems that a bill for an injunction not filed as an original, the order upon which has never been complied with, cannot be considered as a record of court, so as of itself to be evidence in a chancery suit between the same parties.[3] And the same rule has been adopted as to a bill of discovery which has been withdrawn before any answer to it has been filed,[4] or where the bill and answer are offered together.[5]

It may be said to be the general rule, that, *whenever a material averment well pleaded is passed over by the adverse party without denial, whether by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is thereby, for the purpose of pleading, if not for the purpose of trial before the jury, conclusively admitted.*[6] But it is only as to *material* allegations that the rule operates, and therefore a demurrer admits no more than is well pleaded ;[7] and, if a plea denies a particular fact alleged in the declaration, it does not thereby admit all the immaterial statements which the pleader has chosen to introduce as part of the plaintiff's case.[8] Thus, where a declaration in assumpsit,—after stating

in said land. R. filed his bill prior to the trustee's sale, making the heirs of F. defendants, for the execution of the agreement. An heir of F. filed a cross-bill against R. A bill was then filed by the heirs at law of A. (making S. defendant), who claimed title to an undivided third part of said land, and S. in his answer relied upon the title of R. and F. It was held that the bill of R. against F., since it was sworn to by the complainant, and since his answer in the cross-bill admitted its filing, might be used in evidence in regard to the title under which he held the land.

Rees *v.* Lawless, 4 Litt. (Ky.) 218. But *contra* see McLemore *v.* Nuckolls, 37 Ala. 662.

[2] Crandall *v.* Gallop, 12 Conn. 365.

[3] Driver *v.* Fortner, 5 Port. (Ala.) 9.

[4] Dean *v.* Davies, 12 Mo. 112.

[5] Clark *v.* Depew, 25 Penn. St. 509.

[6] Com. Dig. Pleader, G. 2; Stephens on Plead. 248; Jones *v.* Brown, 1 Bing. N. C. 484; De Gaillon *v.* L'Aigle, 1 B. & P. 368; Stephens *v.* Pell, 2 Dowl. 629; Green *v.* Hearne, 3 T. R. 301.

[7] Van Landau *v.* Turner, 6 Q. B. 785.

[8] Bennion *v.* Davison, 3 M. & W. 179; Dunford *v.* Trattles, 12 M. & W. 534.

that the defendants were *owners* of a vessel, on which the plaintiff caused to be shipped some potatoes to be carried by them, *as owners* of the vessel, to Liverpool ; in consideration whereof, and of freight, they promised to carry the potatoes safely *as aforesaid*,—alleged as a breach, that through their negligence they were damaged, it was held that the plea of *non assumpserunt* did not admit that the defendants were owners, so as to raise the inference that the captain was their agent, the allegation of ownership being regarded as wholly immaterial. The declaration would have been equally good had there been no such allegation; because the statement that, in consideration of the plaintiff having shipped the goods, and of the freight, the defendants promised to carry them safely, when coupled with an allegation that the goods were not safely carried, was sufficient to make a complete case of liability against the defendants.[1]

An admission *in the record* does not have the effect of shifting the burden of proof, but is treated as a mere *waiver of requiring proof of those parts of the record which are not denied, the party being willing to rest his claim on the other facts in dispute ;* but if any inferences are to be drawn by the jury, *they must have the facts from which such inferences are to be drawn proved like any other facts.*[2]

But the Court of Queen's Bench has held that an admission in the pleadings, whether expressly or by omitting to traverse an allegation, is an admission for all purposes as to the issues arising from that pleading, whether the facts relate to the parties or to third persons, if the allegation so admitted is material.[3]

[1] Bennion *v.* Davison, 3 M. & W. 179, 182, 183 ; Dunford *v.* Trattles, 12 M. & W. 532.

[2] Edmunds *v.* Groves, 2 M. & W. 642, 645 ; Bennion *v.* Davison, 3 M. & W. 183 ; Edmunds *v.* Groves, 2 M. & W. 643. In Fearn *v.* Filica, 7 M. & Gr. 517, CRESSWELL, J., observed, with reference to this doctrine, "I take it that what my brother Alderson meant was, that the fact put in issue was to be proved just as if no admission were made on the record ; that is, that an admission in the record is not to be taken to prove the issue ; " and his Lordship added, "If the rule is not as stated by ALDERSON, B., this singular state of circumstances might arise,—a counsel might ask the jury from the mere state of the record to infer a fact which was directly in issue." Id. 518.

[3] Bingham *v.* Stanley, 29 B. 121.

Sec. 182. **Effect of pleading General Issue, Etc.**

The general issue or other plea in bar admits the character in which the plaintiff sues :[1] as, where a person sues as administrator, that he is administrator ;[2] and if he sues as administrator *de bonis non*[3] or *cum testamento annexo*,[4] such plea admits that the plaintiff legally possesses that capacity, and the admission is conclusive,[5] and the defendant cannot question the regularity or sufficiency of his appointment ;[6] and the same rule applies in all cases where a person sues in an official capacity, as where he sues as State treasurer.[7]

So, where a corporation sues, a plea of the general issue or in bar admits the corporate capacity of the plaintiff, and dispenses with proof of the character, organization, etc.,[8] and this is the rule even as to foreign corporations.[9] So where the plaintiff sues as guardian.[10] So it admits the residence of the plaintiff, as if he sets himself up as a foreigner or a citizen of a certain State for the purpose of giving jurisdiction to the federal courts.[11] The general issue in a writ of entry admits the defendant's tenancy of the freehold.[12] In dower, denial of the marriage or seizin admits all other material allegations, as a demand of dower, etc.,[13] and a denial of marriage admits the seizin.[14] In a writ of right the *mise*

[1] Carpenter *v.* Whitman, 15 John. (N. Y.) 208 ; State Treasurer *v.* Wiggins, 1 McCord (S. C.), 468.

[2] Fraux *v.* Fraux, 2 N. J. L. 166 ; Smith *v.* Ludlow, Anth. (N. Y.) 127.

[3] Floyd *v.* Breckenridge, 4 Bibb (Ky.), 14.

[4] Champlin *v.* Tilley, 4 Day (Conn.), 303.

[5] Henderson *v.* Clark, 4 Bibb (Ky.), 391.

[6] Champlin *v.* Tilley, *ante ;* Henderson *v.* Clark, *ante.*

[7] State Treasurer *v.* Wiggins, 1 McCord (S. C.). 468.

[8] Prop. of Kennebec Purchase *v.* Call, 1 Mass. 483 ; Conrad *v.* Atlantic Ins. Co., 1 Pet. (U. S. C. C.) 388.

[9] Taylor *v.* Bank, 7 Mon. (Ky.) 576 ; Society for Propagation of the Gospel, etc., *v.* Pawlet, 4 Pet (U. S.) 480.

[10] Harper *v.* Distrehan, 2 Mart. (La.) 389.

[11] De Wolf *v.* Rabaud, 1 Pet. (U. S. C. C.) 476 ; and the same rule prevails where the plaintiff sets himself up as a citizen of the State in which he sues for the purpose of obtaining certain advantages which can only be enjoyed by citizens of the State. Shivers *v.* Wilson, 5 H. & J. (Md.) 130.

[12] Killeran *v.* Brown, 4 Mass. 443 ; Mills *v.* Pierce, 2 N. H. 9.

[13] Ayer *v.* Spring, 10 Mass. 80.

[14] Fitzgerald *v.* Garvin, Charlt. (Ga.) 281.

precludes all evidence of non-tenure,[1] and in formedon in the descender, *non devastavit* admits all the material facts in the court except the demise.[2] But in replevin *non cepit in alio loco* does not admit the taking.[3]

In assumpsit, by the assignee of an insolvent, the general issue was held not to supersede the necessity of proving that the plaintiff was assignee.[4] And so of an insolvent's trustees.[5] And where sealed contracts are made negotiable by statute, *non est factum* does not admit the assignment.[6]

The plea of *non est factum* to an action of debt or covenant puts the execution of the deed alone in issue; and the plaintiff need not prove any averments, except such as relate to the validity of the deed. Under this rule it was held that in covenant to pay on receiving one-third of the plaintiff's dower, *non est factum* admitted that the condition was fulfilled, and dispensed with proof of this at the trial.[7] So of eviction, alleged in covenant for quiet enjoyment,[8] so of assets in covenant against an heir, the declaration averring assets,[9] so that the bond declared on is not voidable as being given contrary to certain legislative provisions, for this must be pleaded specially.[10] So in some States, where an equitable defense is admissible, *non est factum* admits that the bond was obtained without fraud or misrepresentation, and upon full consideration, which has not failed, etc.; and if the contrary be intended as a defense, it must be specially pleaded, or notice must be given.[11] So this plea admits the amount averred to have been awarded, in an action upon an arbitration bond.[12] So *non est factum* to a constable's surety bond,

[1] Baller *v.* Peterborough, 3 Rand. (Va) 563.

[2] Dudley *v.* Sumner, 5 Mass. 438.

[3] Williams *v.* Welch, 5 Wend. (N. Y.) 290.

[4] Best *v.* Strong, 2 Wend. (N. Y.) 319.

[5] Winchester *v.* Union Bank of Maryland, 2 G. & J. (Md.) 73.

[6] McMurtry *v.* Campbell, 1 Hamm. (Ohio) 262.

[7] Gardner *v.* Gardner, 10 John. (N. Y.) 47.

[8] Kane *v.* Sanger, 14 John. (N. Y.) 89.

[9] Woodford *v.* Pendleton, 1 H. & M. (Va.) 303.

[10] Commissioners *v.* Hanion, 1 N. & M'C. (S. C.) 554, 555.

[11] Adams *v.* Wylie, 1 N. & M'C. (S. C.) 78; Bollinger *v.* Thurston, 2 Rep. Const. Ct. (S. C.) 447.

[12] Graham *v.* Allen, 2 N. & M'C. (S. C.) 492.

though with notice that the plaintiff (relator) had been satisfied by bidding in property, does not warrant evidence of declarations made by him, calculated to lull the constable into security; the relator thus bringing the damage upon himself, and leaving the constable free from blame.[1] So in an action by the lessee against his lessor on the covenant of title, *non est factum* admits the want of title;[2] in covenant for money, alleging non-payment and averring performance of conditions precedent, as the procuring and delivery of patents, etc., it admits the non-payment, and that the conditions were performed,[3] in covenant averring notice, it admits the notice;[4] in debt on a bail bond assigned by the sheriff, it admits that it was legally assigned;[5] in covenant for non-delivery of slaves on demand, it admits the demand:[6] in debt on an appeal bond, it admits all the averments as to matters of record, non-payment, etc.,[7] and the want of title as well as the eviction, etc., in an action on a covenant of warranty,[8] but not any fact which is not averred; as in an action on a replevin bond that the writ *de ret. hab.* was returned unsatisfied, this not being averred.[9]

A plea of justification in an action of malicious prosecution admits the proceedings set out in the declaration, and throws the onus upon the defendant, even of showing probable cause.[10] In replevin, a plea of property out of the plaintiff admits the taking,[11] and *non cepit* admits property in plaintiff.[12] A *general* plea of tender to two counts, one on an account stated, and another on a *quantum meruit*, is conclusive that a claim for both causes exists, and cannot be

[1] People *v.* Holmes, 5 Wend. (N. Y.) 191.

[2] Barney *v.* Keith, 6 Wend. (N. Y.) 555.

[3] Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307; Courcier *v.* Graham, 1 Hamm. (Ohio) 330.

[4] Thomas *v.* Woods, 4 Cow. (N. Y.) 173.

[5] Soloman *v.* Evans, 3 M'Cord (S. C.), 274.

[6] Mitchell *v.* De Graffenreid, 1 Harp. (S. C.) 450.

[7] Legg *v.* Robinson, 7 Wend. (N. Y.) 194; Hamilton *v.* Averill, 11 id. 624.

[8] Cooper *v.* Watson, 10 Wend. (N. Y.) 202.

[9] Cowdin *v.* Stanton, 12 Wend. (N. Y.) 120.

[10] Morris *v.* Corson, 7 Cow. (N. Y.) 281.

[11] Hume *v.* Gillespie, 3 Mon. (Ky.) 184.

[12] Harper *v.* Baker, 3 Mon. (Ky.) 421.

afterwards limited to an account stated, or to a special agreement for a sum certain.[1] A plea of payment to an action of assumpsit admits the cause of action ;[2] to an action upon an award, it admits the award ;[3] to an action on judgment, it admits the judgment.[4] *Liberum tenementum* conclusively admits the trespass, and the plaintiff's possession of the close ;[5] *solvit ad diem* admits the execution of the bond,[6] and on an issue of property or not property, the taking cannot be questioned.[7] A plea of performance to an injunction bond admits the dissolution of the injunction, and all other facts well pleaded ;[8] and a plea of set-off admits the plaintiff's demand.[9] An averment that a bond is discharged admits that it was executed,[10] and an answer insisting on payment admits the allegation in the petition, of goods sold to the defendant.[11]

But it should be remembered that a plea, though it admits the cause of action, does not admit its amount ; and so of amounts admitted by affirmative pleading in any stage, as by replication, etc., unless the precise sum be made material by the pleadings. In this respect, the affirmative plea is like a judgment by default or on demurrer, where damages must still be assessed.[12] A good instance is the plea of payment in an action of assumpsit.[13]

To the usual plea of an insolvent discharge, the replication denied that the defendant was discharged as he alleged. It was held that it was not necessary to show jurisdiction, as this was admitted by the replication ; and so was the filing of the petition, the same as any other fact not denied.[14] The

[1] Huntington *v.* American Bank, 6 Pick. (Mass.) 340.

[2] Haley *v.* Callar, 1 Ala. 63.

[3] Fraux *v.* Fraux, 2 N. J. L. 166.

[4] Raymond *v.* Wheeler, 9 Cow. (N. Y.) 295.

[5] Singleton *v.* Millet, 1 N. & M'C. (S. C.) 355 ; Caruth *v.* Allen, 2 M'Cord (S. C.), 226.

[6] Sandford *v.* Hunt, 1 C. & D. 118.

[7] Hume *v.* Gillespie, 3 Mon. (Ky.) 184.

[8] Harrison *v.* Park, 1 J. J. Mar. (Ky.) 170, 172.

[9] Morgan *v.* Boone, 1 J. J. Mar. (Ky.) 585, 586.

[10] Naba *v.* Carlin, 3 La. 373.

[11] Akin *v.* Bedford, 4 La. 615.

[12] Waggener *v.* Bells, 4 Mon. (Ky.) 7, 11, 12.

[13] Haley *v.* Callar, 1 Ala. 63.

[14] Andrews *v.* Pledger, 4 C. & P. 381.

replication of a new promise to a plea of infancy admits the infancy.[1] It was held that where the defendant went to trial without a rejoinder, the facts stated in the replication should be taken as admitted, although the attention of the court and jury was not called to the state of the pleadings; and there being a verdict for the defendant, a new trial was, for that reason, granted.[2] Most courts would probably have amended the issue and retained the verdict. To a plea of set-off, and that the plaintiff got a transfer of the note to avoid the set-off, a replication that the note was the plaintiff's property was held to admit both the set-off and the fraudulent transfer.[3] The plea of non-tenure to an avowry for rent, setting up a seizin and deducing title, admits the seizin and demise.[4] *Riens in arrere* admits the defendant's title.[5] To an avowry and cognizance setting forth a lease and rent, by two defendants, averring that B., one of the defendants, distrained as bailiff of A., the other, the plaintiff pleaded, simply denying that B. was bailiff, and held that this admitted the lease and the amount of rent, as set forth.[6] *Qui non negat, fatetur*, is the maxim in respect to pleading. All material allegations not denied are admitted. Thus, where in trespass *de bonis asportatis* the defendant pleaded that he assisted the sheriff in taking the goods in execution against the plaintiff, and the plaintiff replied a previous *ca. sa.*, an arrest and a voluntary escape, and that the defendant then sued out the execution in question, and the rejoinder was that this execution was sued out by another, and not the defendant, this was held to admit the escape and other material allegations, except that this execution was sued out by the defendant.[7] On replication setting forth a code of by-laws and alleging a breach, an issue on the breach admits the by-laws.[8] In assumpsit, the defendant pleaded a set-off of

[1] Goodsell *v.* Myers, 3 Wend. (N. Y.) 479.

[2] Porter *v.* Kent, 1 M'Cord (S. C.), 205.

[3] Savage *v.* Davis, 7 Wend. (N. Y.) 223.

[4] Bloomer *v.* Juhel, 8 Wend. (N. Y.) 408.

[5] Bloomer *v.* Juhel, *ante.*

[6] Solomon *v.* Harvey, 1 N. & M'C. (S. C.) 81.

[7] Cheever *v.* Mirrick, 2 N. H. 376.

[8] Union Bank of Maryland *v.* Ridgley, 1 H. & G. (Md.) 324.

$2,500; replication that the defendant was in debt to the plaintiff $3,000, and paid the plaintiff $2,500 in part thereof; rejoinder, that he had not owed the $3,000; the plaintiff has the onus, for he has admitted by the replication the payment of the $2,500.[1] If the plaintiff reads a part of the defendant's answer in evidence without objection, the facts stated in the answer and so read may be taken as proved, though the answer being denied in the reply, could not have been read if objected to.[2] Under an answer containing a general denial of all the allegations of the complaint, which is for labor and services, evidence of payment or partial payment is inadmissible.[3] Where the complaint, on a promissory note, alleges that defendants made the same and have not paid it, the answer alleging payment forms a direct issue; so held under the code as it stood in 1848.[4] An award is also new matter which cannot be proved unless it is set up in the answer.[5] So is the defense of a former suit pending.[6] Partial defenses may be pleaded.[7] If the plaintiff reads a part of the defendant's answer in proof of a fact stated in it, then the defendant has a right to insist that the whole answer be read and taken together.[8] In pleading a bankrupt's discharge it is held necessary to show that the court had jurisdiction to grant it, by averring the existence of the facts on which jurisdiction depended. But when the discharge is offered in evidence, jurisdiction to grant it should be presumed until the contrary appears.[9] When the discharge is given in evidence without having been pleaded, evidence is admissible to impeach it for fraud.[10]

The form of the issue indicates the proof which is admissible under the pleadings; if the complaint alleges that the defendants opened a ditch in the highway, and that plaintiff

[1] Waggener *v.* The Bells, 4 Mon. (Ky.) 7, 11.

[2] People *v.* Norton, 9 N. Y. 176.

[3] McKying *v.* Bull, 16 N. Y. 297.

[4] Van Giesen *v* Van Giesen, 10 N. Y. 316.

[5] Brazill *v.* Isham, 12 N. Y. 9, 17.

[6] Gardner *v.* Clarke, 21 N. Y. 399.

[7] 11 N. Y. 347; 16 N. Y. 297.

[8] Gildersleeve *v.* Mahoney, 5 Duer (N. Y.), 383.

[9] Ruckman *v.* Cowell, 1 N. Y. 505.

[10] Id. 507.

without any fault or want of care on his part fell into it, and the answer denies that the plaintiff without any fault or want of care on his part did fall therein, the issue involves the fact of his falling into it, and plaintiff's care or want of care.[1] And if the complaint is for work and labor performed, and goods sold and delivered, claiming $197.25, and the answer alleges that the goods were furnished, and the services rendered under an agreement at stipulated prices, amounting to $181.00, but that they were worth no more than $173.00, the defendant may show the work done under a contract, and that there were defects in it.[2]

The tacit admission of a material fact by pleading over and traversing some other material allegation, will not operate in the cause to the prejudice of the party making it, *if he succeeds* on the issue raised in his traverse.[3]

Sec. 183. Omitting to traverse.

The omission to traverse a *material* allegation so far admits it that the party pleading over cannot disprove it.[4] But, although a declaration or plea in an action may, in certain cases, be used as a conclusive admission in another, it *can never be used by the opponent as evidence to establish his case on another issue on the same record.*[5] For instance, if not guilty and a justification is pleaded to a declaration in trespass, the admission of the trespass in the justification will not entitle the plaintiff to a verdict on the plea of not guilty; because, whatever issues are joined upon any counts or pleas are to be tried by the jury distinctly from each other.[6] So strict is this rule, that a special plea, held bad on demurrer, cannot be read by the plaintiff at the trial of the general issue, as a direct admission by the defendant of the state-

[1] Wall *v.* Buffalo Water Works Co., 18 N. Y. 119.

[2] Maffat *v.* Sackett, 18 N. Y. 522.

[3] Robins *v.* Maidstone, 4 Q. B 811.

[4] Bonzi *v.* Stewart, 4 M. & G. 295; Carter *v.* James, 13 M. & W. 145; Cawlinshaw *v.* Cheslyn, 1 C. & J. 481.

[5] Knight *v.* M'Douall, 12 A. & E. 438. See Hyde *v.* Watts, 12 M. & W. 254, as to when the defects in one pleading may be cured by admissions contained in the pleadings of the adverse party.

[6] Gould *v.* Oliver, 2 M. & G. 234; Harington *v.* Macmorris, 5 Taunt. 228.

ments therein contained, though the jury is summoned to assess the damages on the demurrer, as well as to try the cause on the general issue;[1] neither can the defendant, under similar circumstances, advert to the plea, and use the demurrer as an indirect admission by the plaintiff of the facts stated in such plea.[2] So, where a declaration contained two inconsistent counts, on the second of which the defendant paid money into court, which the plaintiff accepted, it was held that such count, and the proceedings thereon, could not be read to the jury by the defendant as evidence to negative an allegation in the first count.[3] It was contended, in that case, that taking the money out of court in satisfaction of the matter in the second count was an *act* of the plaintiff apparent on the record, of which the defendant was entitled to avail himself. But the court held that this part of the pleading was not before the jury.[4]

Sec. 184. New Assignment.

A new assignment does not admit the truth of those matters stated in the plea which it does not pretend to traverse; for, although a distinction for some purposes may very properly be drawn between collateral and continuous pleading, and it may perhaps be contended with truth that a new assignment, to a certain extent, falls within the latter class, yet it is obvious that the plaintiff, by adopting this course of pleading, intends to waive all inquiry respecting the facts stated in the plea, as not applying to the true cause of action. The effect, therefore, of a new assignment is not strictly to admit the truth of these facts, but to withdraw them entirely from consideration, as forming any part of the subject-matter of the action, and thus, on the one hand, to prevent the plaintiff from complaining of them, and, on the other, to preclude the defendant from relying on them in the support of the issue raised on the new assignment. They are, in point of fact, to be regarded as if they were struck out of

[1] Firmi *v.* Crucifix, 5 C. & P. 98; Montgomery *v.* Richardson, 5 id. 247.

[2] Ingram *v.* Lawson, 2 M. & R. 253.

[3] Gould *v.* Oliver, 2 M. & G. 208.

[4] Gould *v.* Oliver, *ante*.

the record, and the true grounds of complaint are to be sought in the explanation of the declaration which the new assignment contains.[1] For some purposes, indeed, the matters stated in the plea, and not disputed by the new assignment, will be noticed by the court; as, for instance, if to an action for assault the defendant justifies, and the plaintiff new assigns another assault on a different occasion, the latter must either prove both assaults, or at least show that the one of which he complains in his new assignment is substantially different from that alleged in the plea; and so, if in an action of trespass, *quare clausum fregit*, a justification is pleaded under a right of way, and a trespass *extra viam* is new assigned, the plaintiff must prove at the trial that such last-named trespass was in fact committed; but in both these cases the proof is required, not so much on account of any admission assumed to have been made by the plaintiff, as because it directly establishes the issue which has been raised by the new assignment.[2]

The rule does not apply to cases where, the issue found being immaterial, the court have to determine whether they will grant a *repleader*, or will allow the plaintiff to enter up judgment *non obstante veredicto*, or the defendant to arrest the judgment.[3] Here a distinction prevails between an express admission or a pleading in confession and avoidance on the one hand, and an implied admission from traversing other facts on the other, the latter not being regarded by the court in the light of an admission at all.[4] Thus it has been held that judgment *non obstante veredicto* can be awarded only on a pleading by the defendant in confession and avoidance, and not on an implied confession in a rejoinder of that part of a replication which it does not answer;[5] and this seems to lead to the conclusion that judgment for the plaintiff cannot be

[1] Norman *v.* Wescombe, 2 M. & W. 349, 360, 361; Dand *v.* Kingscote, 6 M. & W. 197; Brancker *v.* Molyneux, 1 M. & G. 710; Stephens on Pl. 261.

[2] Darby *v.* Smith, 2 M. & Rob. 184; Oakley *v.* Davis, 16 East, 86. See Bolton *v.* Sherman, 2 M. & W. 399; Alston *v.* Mills, 9 Ad. & El. 248.

[3] Gwynne *v.* Burnell, 6 Bing. N. C. 479.

[4] Atkinson *v.* Davies, 11 M. & W. 240.

[5] Gwynne *v.* Burnell, 6 Bing. N. C. 453; 1 Scott, N. R. 711, S. C.

arrested on the ground that the traverse of a part of a plea contains an implied confession of the residue. The proper course seems, in both cases, to award a repleader.[1] The *rule in equity with respect to admissions* in pleading is different from that at common law; a demurrer being regarded by courts of equity as simply raising the question of law, without any admission of the truth of the allegations contained in the bill — so that if the demurrer be overruled, an answer may still be put in; and a plea being merely a statement of circumstances sufficient to show that, supposing the facts to be true, the defendant is not bound to answer. It follows that, in a future action between the same parties, neither the demurrer nor plea can be received in evidence as amounting to an admission of the facts alleged in the bill.[2]

Sec. 185. Admissions acted upon by others to their Prejudice.

Where an admission has been acted upon by another, the person making it cannot deny it, where such denial would operate prejudicially to the person who has acted upon it.

This rule is illustrated in numerous ways. Thus, if a man co-habits with a woman and treats and presents her to the world as his wife, he is estopped from denying that she is his wife as against those who have furnished her with goods upon the faith of the relation;[3] and a woman who has lived with a man under such circumstances is, so far as the rights of third persons are affected thereby, estopped from denying that she is his wife.[4] But where a woman is really married to a man, and she had obtained credit upon a declaration by her that she is a single woman, it is held that she is not estopped from setting up her marriage in defense.[5]

[1] Atkinson *v.* Davies, 11 M. & W. 236, 242, where the court explains and adopts the rule of law laid down in Gwynn *v.* Burnell. These cases overrule the dictum of the Court of Common Pleas, as reported in Rand *v.* Vaughan, 1 Bing. N. C. 769; 1 Scott, 670, S. C. See, also, Pitts or Witts *v.* Polehampton, 3 Salk. 305; 1 Lord Raym 391, S. C.; Plummer *v.* Lee, 2 M. & W. 495; 5 Dowl. 755, S. C.; Gordon *v.* Ellis, 2 Dowl. & L. 308, 318, 319.

[2] Tompkins *v.* Ashby, M. & M. 32.

[3] Munroe *v.* De Chamaut, 4 Camp. 215; Watson *v.* Threlkeld, 2 Esp. 637.

[4] Divoll *v.* Leadbitter, 3 Pick. (Mass.) 220; Mace *v.* Cadell, 1 Camp. 233; Batthews *v.* Galindo, 4 Bing. 613.

[5] Glenister *v.* Thynne, Easter T. 1847, CATEREDGE, J.

Where a person knowingly permits his name to be used in a firm under such circumstances of publicity as to warrant a jury in finding that a creditor knew of it and believed him to be a partner, he is liable to such stranger in all the transactions in which he gave credit to the firm upon the faith of his being a partner.[1]

So, if a party has taken advantage of, or voluntarily acted under, the bankrupt or insolvent laws, he shall not be permitted, as against parties to the proceedings, to deny their regularity.[2] So, if a person having a right to an estate permits or encourages a purchaser to buy it of another, the purchaser shall hold it against the person who has the right;[3] and the same doctrine applies to personal property.[4] Trespass is not maintainable against a sheriff's officer who executes process against a man by a wrong name, either by taking his person, or seizing his goods, if before the process be sued out, he is asked his name, and gives such wrong one;[5] and if a party, who has entered into a bond by a wrong name, is sued in that name, he cannot cause the declaration to be amended at the cost of the plaintiff,[6] and he is estopped from denying that the name in which he was sued was his real name. So, although a breach of covenant can in no case be justified by a parol license to break it,[7] yet a forfeiture occasioned by it may sometimes be waived by the

[1] Dickinson *v.* Volpy, 10 B. & C. 122; Guidon *v.* Robson, 2 Camp. 302.

[2] Like *v.* Howe, 6 Esp. 20; Clarke *v.* Clarke, 6 id. 61; Gouldie *v.* Gunston, 4 Camp. 381; Watson *v.* Wace, 5 B. & C. 153, explained in Heane *v.* Rogers, 9 B. & C. 586, 587; Mercer *v.* Wise, 3 Esp. 219; Harmar *v.* Davis, 7 Taunt. 577; Flower *v.* Herbert, 2 Ves. Sr. 326.

[3] 3 Sugden Ven. & Pur. 428; Sandys *v.* Hodgson, 10 Ad. & El. 476.

[4] Pickard *v.* Sears, 6 Ad. & El. 469; Gregg *v.* Wells, 10 Ad. & El. 90; Coles *v.* Bank of England, 10 Ad. & El. 437.

[5] As to a *ca. sa.*, see Morgans *v.* Bridges, 1 B. & A. 650, 651; Magnay *v.* Fisher, 5 M. & G. 778, 787. This last case overrules Coote *v.* Leighworth, Sir Fra. Moore, 557, and a dictum of Lord Hale in Thurbane, Hardres, 323. As to a *fi. fa.*, see Price *v.* Harwood, 3 Camp. 108; Fisher *v.* Magnay, 5 M. & G. 787; Reeves *v.* Slater, 7 B. & C. 486.

[6] Hyckman *v.* Shotbolt, 3 Dyer, 279, b.; R. *v.* Wooldale, 6 Q. B. 566; Mayby *v.* Shepherd, Cro. Jac. 640; Williams *v.* Bryant, 5 M. & W. 447.

[7] Doe *v.* Gladwin, 6 Q. B. 953, 962; West *v.* Blakeway, 2 M. & G. 729.

conduct of the covenantee. Thus where there is a covenant to insure by the tenant, which is qualified by an option given to the landlord to insure if the tenant makes default, and to add the premiums to his rent, in ejectment for a forfeiture for not insuring, the defendant may defeat the action by proving that the landlord represented to him that he had exercised the power, and had himself insured the premises.[1] So a tenant, who has paid rent, and acted as such, is not permitted to set up a superior title of a third person against his lessor, in bar of an ejectment brought by him; for he derived the possession from him as his tenant, and will not be allowed to repudiate that relation. This doctrine applies to the relation of bailor and bailee, and principal and agent; the rule being that *bailees* or *agents* cannot dispute the titles of their bailors or principals.[2]

Consequently, if a warehouseman, wharfinger, banker, attorney, agent, or other depositary of goods or moneys, has once acknowledged the title of a person as his bailor or principal, and has agreed to hold the goods or moneys subject to his order, or to sell the goods and to account for the proceeds, he will be estopped from setting up the title of a third person to the same goods or moneys, or from otherwise defeating the rights of his bailor or principal, against his own manifest obligations to him.[3] But an exception is made where the bailor or principal has obtained the goods fraudulently or tortiously from the third person,[4] if the defendant shows that he was unacquainted with the circumstances when

[1] Doe *v.* Sutton, 9 C. & P. 706; Doe *v.* Gladwin, 6 Q. B. 962, 963: Doe *v.* Rowe, 2 C. & P. 246.

[2] Dixon *v.* Hamond, 2 B. & A. 310, 313; Story on Agency, § 217; Phillips *v.* Hall, 8 Wend. (N. Y.) 610; Drown *v.* Smith, 3 N. H. 299; Eastman *v.* Tuttle, 1 Cow. (N. Y.) 248; M'Neil *v.* Philip, 1 M'Cord (S. C.), 392; Chapman *v.* Searle, 3 Pick. (Mass.) 38, 44; Jewett *v.* Torry, 11 Mass. 219; Lyman *v.* Lyman, 11 id. 317; Story on Bailm., § 102.

[3] Gosling *v.* Birnie, 7 Bing. 339; Stonard *v.* Dunkin, 2 Camp. 344; Harman *v.* Anderson, 2 id. 243; Hawes *v.* Watson, 2 B. & C. 540; Dixon *v.* Hammond, 2 B. & A. 310; Roberts *v.* Ogilvy, 9 Price, 269; Farringdon *v.* Clerk, 3 Doug. 124; Holl *v.* Griffin, 10 Bing. 246; Nickolson *v.* Knowles, 5 Mad. 47; Evans *v.* Nichol, 3 M. & G. 614.

[4] Hardman *v.* Willcock, 9 Bing. 382, n.

he made the admission,[1] and that such third person has actually made a claim to the goods or moneys in question.[2] The bailor's title may be impugned if the circumstances are such as to show that he, in connection with some third person, has practiced a fraud on the bailee, by representing goods to belong to the bailor, which, in fact, were the property of such third person, if additional proof is given that the defendant, in consequence of the fraudulent misrepresentation, has sustained any real injury.[3] On the same principle, a vendor, who has sold goods to a party as a sole purchaser, and has directed his factors to weigh them over to such party, and to enter them in his name in their books, cannot, after such sale and transfer, dispute his title as sole proprietor, or detain the goods, on the authority of a third person, who claims to be a joint purchaser.[4]

This rule also applies to acceptors of bills, and in an action against the *acceptor* the defendant cannot show that his signature has been forged, *if he has accredited the bill, and induced the plaintiff to take it, by saying that the acceptance was his, and that the bill would be duly paid.*[5]

The *acceptance* of a bill of exchange is also treated as a *conclusive admission*, as against the acceptor, of the signature of the drawer,[6] and of his capacity to draw ;[7] and if the bill is payable to the order of the drawer, of his capacity to indorse ;[8] and if it is drawn by procuration, of the authority of the agent to draw in the name of the principal ;[9] and it is immaterial whether the bill is drawn before or after the acceptance.[10] There is, however, generally no such admis-

[1] Gosling *v.* Birnie, 7 Bing. 346.

[2] Betteley *v.* Reed, 4 Q. B. 511, 517, 518.

[3] Scott *v.* Crawford, 4 M. & G. 1031.

[4] Kieran *v.* Sandars, 6 Ad. & El. 515.

[5] Leach *v.* Buchanan, 4 Esp. 226 ; Sanderson *v.* Collman, 4 M. & G. 222.

[6] Sanderson *v.* Collman, 4 M. & G. 209 ; Bass *v.* Clive, 4 M. & S. 13.

[7] Id. See Haly *v.* Lane, 2 Atk. 182.

[8] Taylor *v.* Croker, 4 Esp. 187 ; Pitt *v.* Chappelow, 8 M. & W. 616 ; Drayton *v.* Dale, 2 B. & C. 293 ; Sanderson *v.* Collman, 4 M. & G. 218.

[9] Robinson *v.* Yarrow, 7 Taunt. 455 ; Jones *v.* Turnour, 4 C. & P. 204.

[10] Schultz *v.* Astley, 2 Bing. N. C. 544.

sion on the part of the acceptor, of the genuineness of the signature of the payee, although he is the same party as the drawer,[1] or of any other indorser; and this, although at the time of the acceptance, the indorsements were on the bill.[2] Neither does the acceptance admit that an agent who has drawn a bill by procuration, payable to the order of the principal, has authority to indorse the same.[3] So, if on a bill payable to the order of the drawer the name of a *real* person as drawer and indorser is *forged*, it seems that the mere acceptance of the bill, in *ignorance* of the forgery, will not preclude the acceptor from denying the genuineness of the indorsement, though it be in the same handwriting as the drawing, which he is bound to admit;[4] but if the acceptor, with *knowledge* of the forgery, puts the bill in circulation, he will be estopped from disputing the validity of the indorsement equally with that of the drawing, and the same rule prevails if the bill is drawn in a wholly *fictitious* name, and the handwriting of the indorsement is the same as that of the drawing, and the acceptor will be estopped from denying it, because he admits that the bill is drawn by *somebody*, that is, by the person who indorses in the same handwriting, and the fair construction to be put on his undertaking is, that he will pay to the signature of the same person who signed for the drawer.[5]

The reasons usually assigned for these distinctions are, that as the acceptor is only presumed to be acquainted with the handwriting of the drawer, it is sufficient if he ascertains that his signature is genuine, and that he is not bound to look at the back of the bill at all; and that if he was, he could not be supposed to know the handwriting of indorsers who would probably be strangers to him; and that a different rule would raise nice questions of fact in every case, as to whether the bill was indorsed before or after acceptance, and

[1] Macferson *v.* Thoytes, Pea. 20; Bosanquet *v.* Anderson, 6 Esp. 44; Cooper *v.* Meyer, 10 B. & C. 471.

[2] Smith *v.* Chester, 1 T. R. 654.

[3] Robinson *v.* Yarrow, 7 Taunt. 455; Beeman *v.* Duck, 11 M. & W. 255.

[4] Beeman *v.* Duck, 11 M. & W. 251, 255.

[5] Cooper *v.* Meyer, 10 B. & C. 468, 471; Beeman *v.* Duck, 11 M. & W. 253–256.

would, consequently, embarrass the circulation of negotiable securities, by rendering the position of acceptors hazardous and undefined.[1]

Upon the same principle an *indorsement* by the payee of a promissory note is a conclusive admission of the handwriting of the maker,[2] but not of any preceding indorser.[3] Although an indorsee who sues an indorser may be saved the necessity of proving the prior indorsements, by alleging in the declaration that the defendant indorsed a bill *purporting to be drawn* by the drawer, and indorsed by him to the defendant, yet, if he chooses to aver positively that the bill was drawn by a certain person, it seems that the defendant is still competent in law to deny that fact, though his indorsement is cogent, and almost irresistible, evidence of its truth.[4] In those cases where the admission is conclusive, it may either be replied by way of estoppel *in pais*,[5] or if the matter of estoppel appears on the pleadings, the party may avail himself of it on demurrer.[6] It makes *no difference* in the operation of this rule, whether the admission was *true* or *false*, or whether it proceeded from *mistake* or *design;* it being the fact that it *has been acted upon* which renders it conclusive.[7]

But admissions, which *have not been acted upon*, or by which *the situation of the opposite party has not been prejudiced or altered*, although receivable in evidence against the parties making them, are not conclusive. Thus, if A. contracts to sell timber to B., and gives him a delivery order, he may still, on B.'s bankruptcy, meet an action of trover

[1] See Story on Bills of Ex., § 263; Robinson *v.* Yarrow, 7 Taunt. 458; Smith *v.* Chester, 1 T. R. 654; Canal Bk. *v.* Bk. of Albany, 1 Hill (N. Y.), 287.

[2] Free *v.* Hawkins, Holt, N. P. R. 550.

[3] Armani *v.* Castrique, 13 M. & W. 443. But see Critchlow *v.* Parry, 2 Camp. 182.

[4] Armani *v.* Castrique, 13 M. & W. 449, 450.

[5] Sanderson *v.* Collman, 4 M. & G. 209.

[6] Armani *v.* Castrique, 13 M. & W. 451.

[7] Doe *v.* Lambly, 2 Esp. 635, 636; Morgans *v.* Bridges, 1 B. & A. 650; Hall *v.* White, 3 C. & P. 136; Stables *v.* Eley, 1 C. & P. 614; Howard *v.* Tucker, 1 B. & Ad. 712; Salem *v.* Williams, 8 Wend. (N. Y.) 483; 9 id. 147; Chapman *v.* Searle, 3 Pick (Mass.) 38, 44; Den *v.* Oliver, 3 Hawks (N. C.), 479; Salem Bk. *v.* Gloucester Bk., 17 Mass. 1; Simmons *v.* Bradford, 15 Mass. 82; Eaton *v.* Ogier, 2 Me. 46.

brought by B.'s assignees, by showing that the delivery order was invalid, and therefore did not amount to a constructive delivery of the goods, provided B. has neither paid for them, nor sold them to a third party.[1] So, if the question merely relates to the admissibility of a witness, whom the defendant has acknowledged to be his wife,[2] or partner, such acknowledgment will not preclude him from showing that in fact the witness is not incompetent.[3] So, in an action for the escape of a prisoner arrested at the suit of the plaintiff, the defendant, by having received the prisoner into custody, is not estopped from disputing the legality of the custody.[4] Neither will the court treat as conclusive evidence the admission that his trade was a nuisance, by one indicted for setting it up in another place;[5] or the admission by the defendant, in an action for adultery, that the "*teterrima causa*" was the wife of the plaintiff.[6] So, a creditor is not estopped from bringing an action against a sheriff for a false return, by accepting the amount levied on account, and towards the satisfaction, of the debt mentioned in the writ;[7] and where a person brought an action of trover for a dog, he was held not to be precluded from proving his title to it, though he had previously authorized a third party, against whom the defendant had brought a similar action, to deliver it to the defendant, in the place of paying 50*l.*, which was the alternative directed by the verdict; the third person having, at the time of delivery, demanded back the dog, on behalf of the plaintiff, as his property. In these, and similar cases, no wrong is done to the other party by receiving any legal evidence to show that the admission was erroneous, and by leaving the whole evidence, including the admission, to be

[1] Lackington *v.* Atherton, 7 M. & G. 360.

[2] Batthews *v.* Galindo, 3 C. & P. 238.

[3] Brockbank *v.* Anderson, 7 M. & G. 295; Barker *v.* Stubbs, 1 M. & G. 44; Russell *v.* Blake, 2 M. & G. 374; Poole *v.* Palmer, 9 M. & W. 71; Kell *v.* Nainby, 10 B. & C. 20; Glossop *v.* Colman, 1 Stark. 25; Parsons *v.* Crosby, 5 Esp. 199; Ward *v.* Haydon, 2 Esp. 552.

[4] Contant *v.* Chapman, 2 Q. B. 771.

[5] R. *v.* Neville, Pea. 91.

[6] Morris *v.* Miller, 4 Burr. 2057; Rigg *v.* Curgenven, 2 Wils. 399.

[7] Holmes *v.* Clifton, 10 Ad. & El. 673, overruling Beynon *v.* Garrat, 1 C. & P. 154.

weighed by the jury.[1] In some few cases connected with the administration of public justice, and of government, the admission is held conclusive, on grounds of *public policy*. Thus, in an action for penalties for election bribery, it was held that a man, who had given money to another for his vote, should not be admitted to say that such other person had no right to vote.[2] So, where the owners of a stage coach took up more passengers than were allowed by statute, and an injury was laid as having arisen from overloading, their conduct was held to be conclusive evidence that the accident was occasioned by the cause assigned.[3] So, one who has officiously intermeddled with the goods of another recently deceased, is in favor of creditors, estopped to deny that he is executor.[4] And if an executrix treats the goods of her testator as the property of her husband, she will not be allowed to object to their being taken in execution for her husband's debt.[5]

Sec. 186. Admissions under Oath in Deeds, Etc.

The mere fact that an admission was made under oath does not of itself render it conclusive against the party, but it adds greatly to the weight of the testimony, throwing upon the party making it the burden of showing that it was a case of clear and innocent mistake.[6]

Admissions *in deeds*, as between the parties and their privies, are generally regarded as estoppels, if properly pleaded;[7] and when not technically so, they are entitled to great weight,

[1] Sandys *v.* Hodgson, 10 Ad. & El. 472.

[2] Combe *v.* Pitt, 3 Burr. 1586, 1590; 1 Wm. Bl. 524, S. C.; Rigg *v.* Curgenven, 2 Wils. 395.

[3] Israel *v.* Clark, 4 Esp. 259, *per* Lord Kenyon, recognized by Lord Ellenborough.

[4] Reade's Case, 5 Co. 33, 34; Toller's Law of Exrs., 37–41; 1 Williams Ex. & Ad., 192, 193.

[5] Quick *v.* Staines, 1 B. & P. 293. See Fenwick *v.* Laycock, 2 Q. B. 108.

[6] R. *v.* Clarke, 8 T. R. 220; Thornes *v.* White, 1 Tyr. & Gr. 110; Doe *v.* Steel, 3 Camp. 115. Answers in Chancery are always admissible at common law against the party, but do not seem to be held strictly conclusive, merely because they are sworn to. B. N. P. 236, 237; Cameron *v.* Lightfoot, 2 W. Bl. 1190; Grant *v.* Jackson, Pea. 203; Studdy *v.* Sanders, 2 D. & R. 347; De Whelpdale *v.* Milburn, 5 Price, 485.

[7] Fishmongers' Co. *v.* Robertson, 5 M. & G. 193; Bowman *v.* Rostron, 2 Ad. & El. 295, n.

from the solemnity of their nature.[1] But when offered in evidence by a stranger, the adverse party may repel their effect in the same manner as though they were only parol admissions.[2]

Receipts or other mere acknowledgments, given for goods or money, whether on separate papers,[3] or indorsed on deeds,[4] or on negotiable securities;[5] the *adjustment of a loss*, on a policy of insurance, made without full knowledge of all the circumstances, or under a mistake of law or fact, or under any other invalidating circumstances;[6] and *accounts rendered*, such as an attorney's bill,[7] and the like, do not estop the party making them from denying the facts stated therein; and a bill in Chancery, if admissible at all against the plaintiff in proof of the admissions it contains, is the feeblest possible evidence, the facts stated therein being frequently little more than the mere suggestions of counsel.[8]

Sec. 187. Admissions by Corporate Officers, Etc.

The declarations or admissions of individual members of a corporation are not admissible against the corporation, except as to matters in which they have been authorized to act for it,[9] nor are the admissions of directors or other officers of a corporation, *not forming a part of an official act*, admissible to establish an antecedent fact,[10] unless some authority be-

[1] Doe *v.* Stone, 3 C. B. 176.

[2] R. *v.* Neville, Pea. 91; Woodward *v.* Larking, 3 Esp. 286; Mayor of Carlisle *v.* Blamire, 8 East, 487.

[3] Skaife *v.* Jackson, 3 B. & C. 421; Farrar *v.* Hutchinson, 9 Ad. & El. 641; Wallace *v.* Kelsall, 7 M. & W. 273. These cases overrule Alner *v.* George, 1 Camp. 392; Harden *v.* Gordon, 2 Mason (U. S.), 541, 561; Fuller *v.* Crittenden, 9 Conn. 401; Ensign *v.* Webster, 1 Johns. Cas. (N. Y.) 145; Putnam *v.* Lewis, 8 Johns. (N. Y.) 389; Stackpole *v.* Arnold, 11 Mass. 27; Tucker *v.* Maxwell, 11 id. 143; Williamson *v.* Scott, 17 Mass. 249.

[4] Straton *v.* Rastall, 2 T. R. 366; Lampon *v.* Corke, 5 B. & A. 611.

[5] Graves *v.* Key, 3 B. & Ad. 313.

[6] Reyner *v.* Hall, 7 Taunt. 725; Shepherd *v.* Chewter, 1 Camp. 274; Adams *v.* Sanders, M. & M. 373; Christian *v.* Coombe, 2 Esp. 489.

[7] Loveridge *v.* Botham, 1 B. & P. 49; Bacon *v.* Chesney, 1 Stark. 192, 193. n. *b*; Dawson *v.* Remnant, 6 Esp. 24; Taylor's Ev., 567, 577.

[8] B. N. P. 235; 2 Ph. Ev. 28; Doe *v.* Sybourn, 7 T. R. 3.

[9] Turnpike Co. *v.* Thorp, 13 Conn. 173; Bank *v.* Hart, 3 Day (Conn.), 491.

[10] Bank *v.* Davies, 6 W. & S. (Penn.) 285; Pemigewassett Bank *v.* Rogers, 18 N. H. 255.

yond the mere fact of his being an officer of the corporation is shown.[1] But admissions or statements made by a corporate officer within the line of his authority, or in execution of his authority as such, is admissible.[2]

Where a demand was made upon the secretary of a railroad company for an original or certified copy of a subscription paper, proved to have been in possession of the company, it was held that, the presumption being that he was the custodian of such papers, his answer that it was lost was admissible as competent evidence of this fact against his employer.[3] But where the cashier, upon inquiry made by a surety on a note in the bank, the day after its maturity, informed that it had been paid, and the surety consequently relinquished property which he held for his indemnity, such answer of the cashier was held not admissible in evidence, as not within the scope of his authority or duty.[4]

In a Massachusetts case the defendant gave his bond to the plaintiff for a certain sum, in consideration of the assignment of a patent, the plaintiff representing that a certain company had purchased the right to use it, and were to pay a certain sum therefor, and that its validity had been established in a court of law in a certain place. It was held in an action upon a promissory note, given in exchange for the bond, that it was not competent for the defendant to give in evidence the declarations of the officers of the company when refusing to pay the sum represented to be due from them, as to the reasons for such refusal; nor to prove that the plaintiff had ascertained by inquiry the untruth of his statement that the validity of the patent had been established in a court of law.[5]

In a New Hampshire case H. applied to the cashier of a bank for delay of payment of a note he had given the bank, and his proposition, in writing, was submitted to the directors.

[1] Law *v.* Conn., etc., R. R. Co., 45 N. H. 370; 46 id. 284; Robinson *v.* Lane, 19 Ga. 337.

[2] Sewanee Mining Co. *v.* McMahon, 1 Head. (Tenn.) 582; Chicago, etc., R. R. Co. *v.* Coleman, 18 Ill. 297; Franklin Bank *v.* Cooper, 36 Me. 180.

[3] Indianapolis, etc., R. R. Co. *v.* Jewett, 16 Ind. 273.

[4] Bank *v.* Steward, 37 Me. 519.

[5] McMahon *v.* Tyng, 14 Allen (Mass.), 167.

The cashier informed H. that his proposal was accepted, and the delay was given. It was held that the declarations of the cashier to H. were not evidence of what the terms of the contract were.[1] In an action by a corporation to recover damages for the conversion of property conveyed to it by P. and B., its officers and principal stockholders, and taken by the defendant on execution against P. and B., the issue was as to the good faith of the transfer to the corporation. It was held that evidence was admissible as to the acts and declarations of P. and B., tending to show that they were using the property after the transfer as if it were their own.[2] The declarations of a person made while obtaining the promissory note of another, to be used as a part of his contribution towards the capital stock of an insurance company, are not admissible against the company, unless it is shown that the person so obtaining the note was the agent of the company.[3] A statement made to a bank officer by a person applying at a bank for the discount of a note, of the intended use of the money, and by that officer communicated to the directors, may be evidence to affect the bank with notice of such use; but is not evidence from which a jury would be authorized to find an agreement between that person and the bank, that the money should be used in that way.[4] Proof of an admission by the secretary of an insurance company, made the morning after a loss had occurred, that the property destroyed was insured at the time of the fire, is not competent as principal evidence, being the declaration of a third person, who, though an agent of the defendant, was not then engaged in the performance of any act relating to his agency, so as to bring the case within the rule which allows the declaration of an agent as part of the *res gestæ*. Neither is such evidence competent, for the purpose of disproving the agent's denial of the alleged admission.[5]

[1] Bank of Grafton *v.* Woodward, 5 N. H. 301.

[2] Persse, etc., Paper Works *v.* Willett, 1 Robt. (N. Y.) 131.

[3] Holbrook *v.* Wilson, 4 Bosw. (N. Y.) 64.

[4] Merchants' Bank *v.* Spalding, 9 N. Y. 57.

[5] First Baptist Church *v.* Brooklyn, etc., Ins. Co., 28 N. Y. 153.

A foreman of a corporation which has ceased business cannot bind the stockholders personally by his settlement made with the operatives, and therefore evidence of such settlement is inadmissible, in a suit against them to recover for services rendered to the corporation.[1] The declarations of the cashier of a bank, of his knowledge that certain stock which stood upon the books of the bank in the name of a certain individual was a trust fund invested for the benefit of others, may be given in evidence under certain circumstances, to charge the bank with knowledge of the fact.[2] The president of a railroad company sufficiently represents his corporation to make his admissions evidence against the company.[3] So a declaration of the engineer just before or after an accident by running over a cow that "his engine should make her time or he'd blow her to hell," is admissible.[4] But evidence of the statements of an engineer of a railroad corporation, as to matter in relation to which he is not shown to be their agent in some way, is inadmissible.[5]

Where a passenger applied to the agent of a railroad company for a ticket, who gave him a certificate that the tickets "were all out," which he showed to the conductor, the testimony of the agent is competent to show that the passenger applied for a ticket and the certificate to show that the conductor knew that the fault of the passenger's not having a ticket, lay with the company and not with the passenger.[6] Officers of a municipal corporation can only bind the corporation by admissions relating to matters which come within the scope of their official duty. Thus where notice of a certain claim upon a town or city is required to be given to a certain officer, his admission that such notice has been given is clearly admissible, but his admission that the claim is a valid one is not admissible.[7] Nor can his admission be used as to a matter which legally should be submitted to the

[1] Strong *v.* Wheaton, 38 Barb. (N. Y.) 616.

[2] Harrisburgh Bank *v.* Tyler, 3 W. & S. (Penn.) 373.

[3] Charleston, etc. R. R. Co. *v.* Blake, 12 Rich. (S. C.) 634.

[4] Railroad Co. *v.* Messino, 1 Sneed (Tenn.), 220.

[5] Baltimore & Ohio R. R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655.

[6] St. Louis, etc, R. R. Co. *v.* Dally, 19 Ill. 353.

[7] Folsom *v.* Underhill, 36 Vt. 580.

voters of the town or city,[1] nor to defeat the title of the corporation to lands.[2]

[1] Morrell *v.* Dixfield, 30 Me. 157.

[2] Walker *v.* Dunspaugh, 20 N. Y. 170.

CHAPTER XVI.

JUDICIAL EVIDENCE.

SECTION.

188. Of what Matters Courts will take Judicial Notice.
189. Public Statutes.
190. Private Statutes.
191. Instances of Matters of which Courts will not take Judicial Notice.
192. Matters of Experience.
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Sec. 188. Of what Matters Courts will take Judicial Notice.

There are certain matters of which courts will take judicial notice, without putting parties to the trouble and expense of proving them. But these matters are comparatively few, and no precise rules can be given relative thereto. But the courts in this country are much more liberal in this respect than the courts of England, and that for the reason that in this country there is less jealousy of the power of courts, and less apprehension of danger that their powers will be tyrannically or oppressively exercised, because they are created by, and derive all their support from, the people, who can make or unmake them, if necessity requires. But in this country even, the courts do not overstep the ordinary limits of common sense and sound discretion in the exercise of this power; but there are matters so fixed, so certain, so notorious, so essentially a part of the ordinary and usual experience of mankind, that to require proof in reference to their existence or operations would be over nice, and productive of useless expense and hardship upon parties.

Sec. 189. Public Statutes.

Our courts will take judicial notice, without proof, of all *public* acts of the State; but private acts, or acts that are

confined in their operation to a few persons, and have no general application or effect, must, if relied upon, be set forth in the pleadings, and proved upon trial, the same as any other fact.[1]

Acts which affect public rights, as acts giving authority to individuals or corporations to make erections or improvements in public navigable streams which affect the rights of navigation, fishery, or any common public right, will be regarded as public acts, although not specially made so in the act itself, and although its benefits or advantages are confined to a few persons.[2]

It would seem, however, that this rule must be restricted to cases where public rights are measurably affected, and where, except for the "act," the acts done in pursuance of it would be a *public nuisance;* that is, it must be such an invasion of public and common rights as to put every person upon inquiry as to the legality or otherwise of the act. In order to make an "act" a "public act" within the rule, it is not necessary that it should be applicable equally to the whole State; but any act which, although confined to a particular district, or part of the State, even though confined to a single township, or a part of a township, if it applies equally to such district, part of the State or township, is a "public act," of which courts will take judicial notice without proof. Thus it has been held that a special act of the legislature, extending the power of a single public officer, as an act extending the jurisdiction of a certain town constable throughout the county or State, is such an act as courts are bound to notice without proof.[3] So of an act under which a person claims the office of a judge of a particular court.[4] So of an act for the protection of fish in a certain river.[5] So of an act providing for the survey of certain lands in a particular county, and providing that no sales of any portion of such

[1] Bowie *v.* City of Kansas, 51 Mo. 454; Covington Draw Bridge Co. *v.* Shepard, 20 How. (U. S.) 227.

[2] Hammond *v.* Inloes, 4 Md. 138.

[3] Bixler *v.* Parker, 3 Bush (Ky.), 166; Levy *v.* State, 6 Ind. 281.

[4] Clark *v.* Com., 29 Penn. St. 129.

[5] Burnham *v.* Webster, 5 Mass. 266.

lands should be made unless surveyed and marked.[1] So where an act, otherwise private and local, contains provisions that are public and general, the act, although partly local and partly public, will be deemed a public act, which need not be pleaded or proved.[2] Thus an act authorizing a municipal corporation to raise money by tax, which also contained a clause that restricted or changed the jurisdiction of the courts in reference to actions in which such corporation was a party, was held to be a public statute, of which the court would take judicial notice.[3]

It will often be found difficult to determine precisely what statutes are, and what are not "public statutes" when the statute only applies to a municipal corporation, or a certain district of the State. But the real test applied by the courts, and the real guide seems to be, that an act which applies equally to all persons within the district designated, or to all persons doing or omitting to do a particular act, is a public statute within the rule. "Though it be true," says BULLER, J.,[4] "that an act of Parliament relating to trade in general is a public act, yet a statute which relates only to a certain trade is a private one." But in another case[5] the court defined the distinction between an act partly private and partly public, in this way: "Although an act concern a particular thing, and therefore is private in its nature, yet if a forfeiture be given to the king by it, this makes it a public act."

So in a later case[6] the court held that, independent of the statute of Anne, an act providing that the sheriff might assign the bail bond was a public statute, of which the court would take notice without its being either pleaded or proved.

In an early English case[7] the learned reporter defined the distinction between public statutes and private statutes thus: "The rule of the law is, that of general statutes the court ought to take notice, although they be not pleaded; other-

[1] Pierce *v.* Kimball, 9 Me. 54. But *contra*, see Allegheny *v.* Nelson, 25 Penn. St. 332.

[2] People *v.* McCann, 16 N. Y. 61; Williams *v.* People, 24 id. 407

[3] Bretz *v.* The Mayor of N. Y., 6 Rob. (N. Y.) 330.

[4] Kirk *v.* Norvill, 1 T. R. 125.

[5] King *v.* Briggs, Skin. 428.

[6] Samuel *v.* Evans, 2 T. R. 569.

[7] Holland's Case, 4 Coke, 79.

wise of special or particular statutes; therefore, for the better understanding of your books in this point, and which shall be said in judgment of law, *statutum generale*, and which is *statutum speciale*, it is to be known that '*generale dicitur a genere, etc., speciale a specie;*' and there are *genus, species et individua.* Spirituality is *genus;* bishopric, deanery, etc., are *species*, and bishopric, or deanery of Norwich is individual. Therefore, it was resolved in this case that, forasmuch as the act of 21 Henry 8 concerns the whole spirituality in general, it was a general act, of which the judges ought to take notice."[1]

Thus it will be seen that, although an act may affect very many persons, yet, if it is not equal and general in its application to all, in the State or the locality to which it relates, it is a private act, which must be pleaded and proved; but, if it is general in its effect, and applies equally to all within the locality to which it relates, it is a public act, of which the courts will take judicial notice. This is the modern rule, which varies essentially from the doctrine advanced in some of the reports. Yet, whenever a purely private act provides in certain events a forfeiture to the government, or, in the case of a corporation, that the government in a certain contingency may take the property, they are deemed public acts.[2] And indeed all acts which in any wise concern the government, or any of its co-ordinate branches, may be said to be public.[3] So all acts in amendment of acts declared public by the terms of the original act.[4] So acts authorizing all corporations of a particular class to do certain acts, as all the railroads of the State to subscribe for the stock of other roads.[5] Or indeed any statutes, providing penalties or remedies affecting all persons who may offend against them, when

[1] In Claypool *v.* Carter, Pash. 31, it was held that an act of Parliament relating to Eton and Winchester colleges was a particular act, of which the judge should not take notice. So in Elmer *v.* Gate, 2 Roll. 466, that the statute of 30 Eliz., relating to leases made by bishops, was a special act, because it concerned bishops only, who are but *species* of spirituality.

[2] Jenkins *v.* Union Turnpike Co., 1 Caines' Cas. (N. Y.) 86.

[3] Dwarris on Statutes, vol. 2, p. 464.

[4] Bank of Utica *v* Smedes, 3 Cow. (N. Y.) 684.

[5] White *v.* Syracuse & Utica R. R. Co., 14 Barb. (N. Y.) 559.

all persons may come within their purview, are regarded as public.[1]

Sec. 190. Private Statutes.

Charters of municipal corporations are public acts, whether so declared in the act creating them or not, and need not be alleged in the pleadings, or proved on the trial, in actions where the provisions of such charters become material.[2] And the same is true as to all amendments thereto.[3] But when municipal corporations are formed under a general law, their organization and all the legal steps requisite to perfect their organization must be proved. So, where, by the terms of the charter, the question of acceptance is submitted to the people, its acceptance by them must be duly alleged and proved.[4] By-laws of a municipal corporation are private acts and will not be judicially noticed.[5] But city courts will take judicial notice thereof.[6] Charters of private corporations are private acts, unless made public by the terms of the act creating them, and must be proved.[7] In Kentucky, courts are now by statute required to take judicial notice of all laws, public or private.[8] But otherwise of charters of banks authorized to issue notes.[9] But courts will not take judicial

[1] Pierce *v.* Kimball, 9 Me. 54; Hendee *v.* Ayres, 12 Pick. (Mass.) 344.

[2] State *v.* Sherman, 42 Mo. 210; Griffing *v.* Gibb, 2 Black (U. S.), 519; Alexander *v.* Milwaukee, 14 Wis. 247; Brell *v.* McDonald, 7 Kan. 426; Case *v.* Mobile, 30 Ala. 538; Terry *v.* Milwaukee, 15 Wis. 490; Janesville *v.* Milwaukee, etc., R. R Co., 7 id. 484; Swaine *v.* Comstock, 18 id. 463; Smith *v.* Flourney, 47 Ala. 345; Letier *v.* Oskaloosa, 41 Iowa. 353; Bretz *v.* Mayor of N. Y., 6 Rob. (N. Y.) 325; Fauntleroy *v.* Hannibal, 1 Dill. (U. S.) 118; Hawthorne *v.* Hoboken, 3 Vroom (N. J.), 72; Payne *v.* Treadwell, 16 Cal. 220.

[3] Hawthorne *v.* Hoboken, *ante;* Terry *v.* Milwaukee, *ante.*

[4] Johnson *v.* Common Council, 16 Ind. 227.

[5] Tucker *v.* Com., 4 Bush (Ky.), 40; Mooney *v.* Kennett, 19 Mo. 551; Cox *v.* St. Louis, 11 id. 431; Garvin *v.* Wells, 8 Clarke (Iowa), 286; Barker *v.* Mayor of N. Y., 17 Wend. (N. Y.) 464.

[6] Conboy *v.* Iowa City, 2 Clarke (Iowa), 90; State *v.* Lieber, 11 id. 407.

[7] Drake *v.* Flewellon, 33 Ala. 674; Tucker *v.* Com., 8 Bush (Ky.), 440; Perdicaris *v.* Trenton, etc., 29 N. J. L. 367; Butler *v.* Robinson, 75 Mo. 192.

[8] Collier *v.* Baptist, etc., Soc., 48 B. Monr. (Ky.) 68.

[9] Buell *v.* Warner, 33 Vt. 570; Davis *v.* Bank of Fulton, 31 Ga. 59; Bank of Newberry *v.* Gr. C. R. R. Co., 9 Rich. (S. C.) 495; Shaw *v.* State, 3 Sneed (Tenn.), 86; State Bank *v.* Watkins, 1 Eng. (Ark.) 123.

notice of the value of their notes, although used as currency, nor of the depreciation of the national currency.[1]

But courts will take judicial notice of the *kind* of currency in use, and that gold and silver coin is no longer used as such, but has become an article of traffic and merchandise,[2] and that contracts made at a particular time are made in reference to the particular currency then in use;[3] also of the genuineness and value of American coin, as dimes, eagles, etc.; and in a case where in an indictment the respondent was charged with the larceny of a gold coin called an American eagle without stating its value, this was held sufficient.[4] But the value of foreign coin or currency must be proved, unless its value has been fixed by congress.[5]

Sec. 191. Instances of Matters of which Courts will not take Judicial Notice.

Courts will not take judicial notice of *local* customs, or the meaning of devices used in a particular trade, and the same, if relied upon, must be proved;[6] but they will judicially notice a general custom of merchants throughout the State,[7] or one so universal and general that persons are presumed to know of it:[8] and of the law merchant;[9] and of commercial usage as to days *dies non*, as Sundays and Christmas.[10] Courts will not generally take notice of historical facts,[11] except matters of public history affecting the whole State or people,[12]

[1] Feemster *v.* Ringo, 5 Monr. (Ky.) 336; Madawell *v.* Holmes, 40 Ala. 391; but see State Bank *v.* Watkins, 1 Eng. (Ark.) 123, *contra.*

[2] U. S. *v.* American Gold Coin, 1 Woolw. (U. S.) 217; Lampton *v.* Hazzard, 3 Monr. (Ky.) 149; Janes *v.* Overstreet, 4 id. 547.

[3] Buford *v.* Tucker, 44 Ala. 89.

[4] Daily *v.* State, 10 Ind. 536; U. S. *v.* Burns, 5 McLean (U. S.), 23; U. S. *v.* King, 5 id. 208.

[5] Kermott *v.* Ayer, 11 Mich. 181; McButt *v.* Hoge, 2 Hilt. (N. Y. C. P.) 81.

[6] Johnson *v.* Robertson, 31 Md. 416; Wheeler *v.* Webster, 1 E. D. Smith (N. Y.), 1; Harsh *v.* North, 40 Penn. St. 241; Humphreysville, etc., Co. *v.* Vt., etc., Co., 33 Vt. 92; Turner *v.* Fish, 28 Miss. 306; Sullivan *v.* Heuse, 2 Col. 424.

[7] Smith *v.* Miller, 43 N. Y. 171; Bronson *v.* Windsor, 8 id. 182.

[8] McKinnon *v.* Bliss, 21 N. Y. 206; Munn *v.* Burch, 25 Ill. 35; Gregory *v.* Baugh, 4 Rand. (Va.) 611.

[9] Jewell *v.* Centre, 25 Ala. 498.

[10] Sassur *v.* Farmers' Bank, 4 Md. 409.

[11] McKinnon *v.* Bliss, 21 N. Y. 206; Gregory *v.* Baugh, 4 Rand. (Va.) 611.

[12] Simonton *v.* Columbian Ins. Co., 37 N. Y. 174; Payne *v.* Treadwell,

as of the existence of civil war in the country,[1] or of the separation of churches of the same denomination, as the separation of the Methodist church into two national bodies under the name of the Methodist Church North, and Methodist Church South;[2] or that a certain college is a national institution;[3] of the division of a State into towns;[4] of the political and social condition of the people of the country over which their jurisdiction extends;[5] of who, from time to time, presides over the patent office, or other executive or judicial department of the government, even though for a temporary, rather than a permanent, purpose.[6] As to the history of a country; the places where courts are, or formerly have been, held therein, and as to the times when said courts were held, and when the change in the place or time of the holding of courts was made.[7] And that it has adopted townships, and when.[8] Of who are public officers of the State, executive or judicial, and of any changes therein; the time when their term of office commenced, and when it ended; also of the genuineness of their signatures.[9] As who is governor,[10] and of appointments made by him under the constitution and laws;[11] of who are judges of subordinate courts;[12] of orders issued by competent military authority;[13] of who are justices of the peace in the county where the court is held, and of the genuineness of their signatures;[14] who are elected sheriffs, time when their term of office commences,

16 Cal. 220; Rice *v.* Shook, 27 Ark. 137; Killebreur *v.* Murphy, 3 Heisk. (Tenn.) 346; Cuyler *v.* Terrill, 1 Abb. (U. S.) 169; Stokes *v.* Macken, 62 Barb. (N. Y.) 145; Wood *v.* Wilder, 43 N. Y. 164; Ferdinand *v.* State, 39 Ala. 706.

[1] Swinnerton *v.* Columbia Ins. Co., *ante*.

[2] Humphrey *v.* Burnside, 4 Bush (Ky.), 215.

[3] Oxford Rate, 8 E. & B. 184.

[4] State *v.* Powers, 25 Conn. 48; King *v.* Kent, 29 Ala. 542.

[5] Irwin *v.* Phillips, 5 Cal. 140.

[6] York & Maryland Line R. R. Co. *v.* Winans, 17 How. (U. S.) 30.

[7] Robertson *v.* Teal, 9 Tex. 344; Ross *v.* Austell, 2 Cal. 183.

[8] Rock Island *v.* Steele, 31 Ill. 543.

[9] People *v.* Johr, 22 Mich. 461; Heizer *v.* State, 12 Md. 330.

[10] Wells *v.* Jackson, etc., Co., 47 N. H. 235.

[11] State *v.* Evans, 8 Humph. (Tenn.) 110.

[12] Kilpatrick *v.* Com., 31 Penn. 198.

[13] New Orleans *v.* Templeton, 20 La. Ann. 141; Lanfier *v.* Mester, 18 id. 497; Taylor *v.* Graham, id. 656.

[14] Graham *v.* Anderson, 42 Ill. 514; Chambers *v.* People, 4 Scamm. (Ill.) 351.

and when it ends, and of the genuineness of their signatures ;[1] but not who are deputy officers, sheriffs or otherwise.[2] Who are the officers of the court, and, in a case where the word "clerk" was omitted from the *jurat* of an affidavit, it was held sufficient, as the court was bound to know who was clerk, and whether his signature was genuine.[3] But not who are officers of other courts.[4] That a certain person is an attorney.[5] And of the genuineness of his signature connected with professional acts done by him, but not in cases in which he is himself a party.[6] Also of what attorneys have appeared in a cause.[7] Who are executive and judicial officers of the United States, elected or appointed in pursuance of the constitution or laws of congress.[8] Who are registrars of a county.[9]

Of general elections,[10] but not of elections in other States, except where it is fixed by act of congress.[11] And who are elected to fill certain offices, when their term begins, when it ends, and of all changes therein, whether by death, resignation or otherwise, and of the genuineness of their signature.[12]

Courts will take judicial notice of notarial certificates as proof of presentation and non-payment ;[13] so of foreign trea-

[1] Rayland *v.* Wynn's Adm., 37 Ala 32 ; Alexander *v.* Burnham, 18 Wis. 199 ; Wetherbee *v.* Dunn, 32 Cal. 106 ; Dyer *v.* Flint, 21 Ill. 80 ; Ingraham *v.* State, 27 Ala. 17.

[2] Ward *v.* Henry, 19 Wis. 76 ; Joyce *v* Joyce, 5 Cal. 449 ; State Bank *v.* Curran, 5 Eng. (Ark.) 142 ; Lunl *v.* Patterson, Minor (Ala.), 14.

[3] Mayor *v.* State, 2 Sneed (Tenn.), 11 ; Dyer *v.* Loat, 57 Ill. 179; Thompson v Haskell, 21 id. 215 ; Bishop *v.* State, 30 Ala. 34.

[4] Norwell *v.* McHenry, 1 Mann. (Mich.) 227.

[5] People *v.* Nevins, 1 Hill (N. Y.), 154.

[6] Masterson *v.* Le Clare, 4 Minn. 163.

[7] Symmes *v.* Mayor, 21 Ind. 443.

[8] York & Md. Line R. R. Co. *v.* Winans, 17 How. (U. S.) 30.

[9] Fancher *v.* De Montegre, 1 Head. (Tenn.) 40.

[10] Rice *v.* Mead, 22 How. Pr. (N. Y.) 445 ; Davis *v.* Best, 2 Clarke (Iowa), 96 ; State *v.* Minnick, 15 id. 123.

[11] Taylor *v.* Renne, 35 Barb. (N. Y.) 272 ; Dale *v.* Wilson, 16 Minn. 525.

[12] Alexander *v.* Burnham, 18 Wis. 199 ; Wells *v.* Jackson, 47 N. H. 235 ; *Ex parte* Peterson, 33 Ala. 74 ; State *v.* Williams, 5 Wis. 308 ; Heizer *v.* State, 12 Ind. 330 ; Ragland *v.* Winn, 1 Ala. 270 ; Templeton *v.* Morgan, 16 La. Ann. 438 ; Ragland *v.* Winn's Adm'r, 37 Ala. 32.

[13] Pierce *v.* Indseth, 106 U. S. 546.

ties with our national government ;[1] so of the charter of a railroad company printed with legislative documents by authority of the State ;[2] so of what is meant by the words "Gift enterprise."[3] Courts will take judicial notice of the time when the sun rises and sets during different days and seasons ;[4] of the days of the week on which particular days of the month fall ;[5] of what constitutes the twentieth judicial day of the term of the court below ;[6] that a particular date falls on Sunday ;[7] of its own judgment in a suit which is virtually a part of the same record ;[8] of the expiration of a bank charter.[9] The United States courts will take judicial notice that the United States for revenue purposes is divided into districts with certain geographical boundaries,[10] and also of the public statutes of the several States ;[12] but State courts will not.[11] Courts will take judicial notice of the official acts of an alderman ;[13] of the official signature of its clerk ;[14] of the repeal of a section of an act incorporating a town ;[15] of the suspension of a public statute.[16] State courts will not take judicial knowledge of bankruptcy proceedings ;[17] but they will take notice of the chancery district in which a certain town in the State is situated ;[18] of matters of public history, as of Fremont's public career in

[1] Lacroix *v.* Sarrazzin, 15 Fed. Rep. 489.

[2] Hall *v.* Brown, 58 N. H. 93. But see Timlow *v.* Philadelphia, etc., R. R. Co., 99 Penn. St. 284.

[3] Lehman *v.* State, 81 Ind. 15.

[4] People *v.* Chee Kee, 61 Cal. 404.

[5] Philadelphia, etc., R. R. Co. *v.* Lehman, 56 Md. 209 ; Reed *v.* Wilson, 41 N. J. L. 29.

[6] Lewis *v.* Wintrode, 76 Ind. 13.

[7] McIntosh *v.* Lee, 57 Iowa, 356.

[8] Farrar *v.* Bates, 55 Tex. 193.

[9] Terry *v.* Merchants', etc., Bank, 66 Ga. 177.

[10] United States *v.* Jackson, 104 U. S. 41.

[11] Edward *v.* Flanagan, 104 U. S. 462.

[12] Robards *v.* Morley, 80 Ind. 185 ; Neese *v.* Farmers' Ins. Co., 55 Iowa, 604 ; Chapman *v.* Colby, 47 Mich. 16.

[13] Fox *v.* Com., 81 Penn. St. 511.

[14] Buell *v.* State, 72 Ind. 523. But see Russell *v.* Sargent, 7 Ill. App. 98, where it was held that an appellate court will not take judicial notice of what persons are judges of the Circuit Court.

[15] Belmont *v.* Morrill, 69 Me. 314.

[16] East Tenn. Iron Manuf. Co. *v.* Gaskell, 2 Lea (Tenn.), 242.

[17] Estabrook Steel Pen Manuf. Co. *v.* Ahern, 30 N. J. Eq. 341.

[18] Alabama, etc., Life Ins. Co. *v.* Cobb, 57 Ala. 547.

California in 1846 and '47 ;[1] of the existence of a *quasi* public corporation, as a railroad corporation ;[2] of the history of the State and its topography and condition ;[3] of the course of seasons and of husbandry ;[4] of the course of business in the country and of new processes of practical utility in facilitating trade ;[5] of the functions of town officers under the statute,[6] and of common epithets which are generally understood, as "Beecher business," applied to a clergyman.[7]

Of the resignation or coming in of public officers ;[8] and of the duties imposed upon persons or officers by State or national law respecting particular matters.[9] Of the jurisdiction of courts of the State and of the United States, and of the acts giving it.[10] That the State and townships are political bodies.[11] Of constitutions of other States and powers thereby given to courts.[12] That public streets in cities are public highways.[13] That municipal corporations have the power to improve streets.[14] Of the navigability of the streams of the State.[15] But not as to what streams are *floatable*.[16] Of the facilities for public travel between different points, the great lines of public travel and their connections.[17] Also, of facts that are a part of the experience of the day, as the usual length of time required for steam pas-

[1] De Celis *v.* United States, 13 Ct. of Cl. 117.

[2] Baltimore, etc., R. R. Co. *v.* Sherman, 30 Gratt. (Va.) 602.

[3] Wilson *v.* State, 54 Ind. 553.

[4] Ross *v.* Boswell, 60 Ind. 235 ; as when crops mature. Tomlinson *v.* Greenfield, 31 Ark. 557.

[5] Wiggin Ferry Co. *v.* Chicago, etc., R. R. Co., 5 Mo. App. 347.

[6] Ingles *v.* State, 61 Ind. 212.

[7] Bailey *v.* Kalamazoo Publishing Co., 40 Mich. 251.

[8] *Ex parte* Peterson, 33 Ala. 74 ; State *v.* Williams, 5 Wis. 308 ; Heizer *v.* State, 12 Ind. 330.

[9] Semple *v.* Hagar, 27 Cal. 163.

[10] Meshke *v.* Van Daren, 16 Wis. 319 ; Bretz *v.* Mayor, etc., of N. Y., 6 Rob. (N. Y.) 326.

[11] Le Grange *v.* Chapman, 11 Mich. 499.

[12] Butcher *v.* Brownsville, 2 Kan. 70.

[13] Wittaker *v.* Eighth Av. R. R. Co., 5 Rob. (N. Y.) 650.

[14] Murray *v.* Titcomb, 19 Ind. 135.

[15] Neaderhauser *v.* State, 28 Ind. 257 ; Brown *v.* Scofield, 8 Barb. (N. Y.) 237.

[16] Adsit *v.* Allen, 42 N. Y. 378 ; Rhodes *v.* Otis, 38 Ala. 578.

[17] Manning *v.* Gasparie, 27 Ind. 399 ; Smith *v.* N. Y. Central R. R. Co., 43 Barb. (N. Y.) 225 ; Mayhee *v.* Camden & Amboy R. R. Co., 45 N. Y. 514 ; Hines *v.* Cochran, 13 Ind. 175.

sage across the Atlantic.[1] Of the coincidence of the days of the week and month.[2] Of the terms of court in the State, their commencement and close.[3] Of the area of an established county and the towns of which it is composed.[4] And where in an indictment an offense is stated to have been committed in a certain town, without naming the county, it is sufficient, as the court will take judicial notice of the county in which the town is situated.[5] But in England the rule is otherwise.[6] Of what lands are held by the general government in the State;[7] of the boundaries of the State,[8] and of all agreements in reference thereto,[9] and of all changes therein;[10] and of counties;[11] and of municipal corporations, when the boundaries are defined in the act creating them;[12] but not where their boundary is purely a matter of municipal regulation, or of record under general laws.[13]

Courts will not take judicial notice that gin and turpentine are inflammable liquids;[14] but they will that coal oil is.[15] So they will take judicial notice of the distance between the principal cities of the country, and of the time ordinarily required for railway trains to run to and from them;[16] but they

[1] Oppenheim *v.* Wolf, 3 Sandf. Ch. (N. Y.) 571; 49 N. Y. Legal Obs. 259.

[2] State *v.* Hammett, 2 Eng. (Ark.) 492; Sprowl *v.* Lawrence, 33 Ala. 106; Seeman *v.* Owen, 31 id. 167; Mechanics' Bank *v.* Gibson, 7 Wend. (N. Y.) 460; Davis *v.* Petticolas, 34 Lex. 27.

[3] Pugh *v.* State, 2 Head. (Tenn.) 227; Morgan *v.* State, 12 Ind. 448; McGinness *v.* State, 24 id. 500; Bethune *v.* Hale, 45 Ala. 522.

[4] Board of Commissioners *v.* Spittler, 13 Ind. 235; Kidder *v.* Blaisdell, 45 Me. 461.

[5] Vanderwerker *v.* People, 5 Wend. (N. Y.) 530; State *v.* Reader, 60 Iowa, 527.

[6] Anonymous, 1 Chitty, 31; Rex *v.* Bourn, Burr. 42; Brune *v.* Thompson, 2 Ad. & El. 789.

[7] Lewis *v.* Harris, 31 Ala. 689.

[8] State *v.* Dunwall, 3 R. I. 480.

[9] Thomas *v.* Stigers, 5 Penn. St. 480.

[10] People *v.* Snyder, 41 N. Y. 397.

[11] Ross *v.* Reddick, 2 Ill. 73; State *v.* Tootle, 2 Harring. (Del.) 541; Goodwin *v.* Appleton, 21 Me. 453; Ham *v.* Ham, 39 Me. 263; State *v.* Jackson, id. 291.

[12] Griffing *v.* Gibb, 2 Black (U. S.), 519; City Council of Montgomery *v.* M. & W. Plank Road Co., 31 Ala. 79; Ham *v.* Ham, 39 Me. 263; Chapman *v.* Wilber, 6 Hill (N. Y.), 475; Bronson *v.* Gleason, 7 Barb. (N. Y.) 472.

[13] Brune *v.* Thompson, 2 Gale & D. 110.

[14] Moseley *v.* Vt. Mut. Fire Ins. Co., 55 Vt. 142.

[15] State *v.* Hayes, 78 Mo. 307.

[16] Pearce *v.* Langfit, 101 Penn. St. 507; 47 Am. Rep. 737.

will not take judicial notice of the distance of a certain mining location from the seat of government;[1] but they will judicially notice that there are or are not tidal streams in the State, as the fact may be,[2] and which of them are or are not tidal streams. That a town in the State is in a certain county, and if such is the fact, that it is the county seat.[3] If it is provided in a public statute that cities shall be divided into wards, the courts of the State will take judicial notice that they are so divided; but where the statute merely provides that they *may* be divided into wards, courts will not presume that they have been so divided. Nor will the court presume that a locality having the requisite number of inhabitants to enable it to become a town under the provisions of a public statute, has availed itself of such provision.[4] Where an act is alleged in the pleadings to have been done in a certain town, the court will take judicial notice of the county in which such town is situated.[5] The Supreme Court of Michigan has carried the doctrine of judicial notice to an extreme point in a recent case, and held that the court is bound to take judicial notice that a box freight car standing still at a railway crossing will not frighten horses of ordinary gentleness.[6] This case seems to trench sharply upon the province of the jury, and if its doctrine is adopted, there would seem to be little use for juries in the class of cases to which it applies. Again, in our judgment, the doctrine is not sustained by human experience; it certainly is not by my own, and seems not to have been in the case before the court. Horses are intelligent animals. When they approach a railway track they know that there is danger to them there, and if they have ever seen a train of cars, they understand that it is moved by some dangerous agency, and when they see a car standing on a track near a crossing, they seem to expect that this

[1] Russell *v.* Hoyt, 4 Mont. 412.
[2] Walker *v.* Allen, 72 Ala. 456.
[3] Carson *v.* Dalton, 59 Tex. 500.
[4] Hopkins *v.* Kansas, etc., R. R. Co., 79 Mo. 98; Temple *v.* State, 15 Tex. App. 304; 49 Am. Rep. 200.
[5] State *v.* Reader, 60 Iowa, 527; *contra*, Clayton *v.* May, 67 Ga. 769. See also Hoffman *v.* State, 12 Tex. App. 406; Boston *v.* State, 5 Tex. App. 383.
[6] Gilbert *v.* Flint, etc., R. R. Co., 51 Mich. 488; 47 Am. Rep. 592.

dangerous agency is there also, and they indicate this belief by their conduct. I feel sure that there are very few people accustomed to the use of spirited, but perfectly gentle horses, whose experience would sustain the court. The courts will take judicial notice of what States joined the Confederacy ;[1] of the result of an election on the question of the removal of a county seat ;[2] of the different classes of notes and bills in circulation as money, at a particular time ;[3] of the disturbed condition of business in war times ;[4] of the issue and depreciation of Confederate money ;[5] that trains run on a railroad are run and controlled by the owners of the road ;[6] of authority given to a county to subscribe for railroad stock ;[7] of public acts regulating the speed of railroad trains ;[8] of the constitution of another State, so far as the jurisdiction of its courts depends thereon.[9] So courts will take judicial notice of the manner in which Confederate money was forced upon the people of the States under the Confederate government ;[10] when the Rebellion was terminated ;[11] of previous financial depressions ;[12] of the commencement and duration of the terms of the circuit court,[13] and of previous proceedings before it in a case on trial,[14] but not of proceedings before it in some other case,[15] nor of the rules of a lower court ;[16] but they will take notice of the different terms of a lower court of a county or district,[17] and of their duration.[18] Courts will not take judicial notice of the charter of a savings bank,[19] nor of a rail-

[1] Dauthitt *v.* Stinson, 63 Mo. 268.

[2] Andrews *v.* Knox County, 70 Ill. 65.

[3] Hart *v.* State, 55 Ind. 599; Lumpkin *v.* Murrell, 46 Tex. 51.

[4] Foscue *v.* Lyon, 55 Ala. 440.

[5] Simmons *v.* Trumbo, 9 W. Va. 358.

[6] South, etc., R. R. Co. *v.* Pilgreen, 62 Ala. 305 ; Evansville, etc., R. R. Co. *v.* Smith, 65 Ind. 92.

[7] Smith *v.* Tallapoosa Co., 2 Woods (U. S. C. C.), 574.

[8] Horn *v.* Chicago, etc., R. R. Co., 38 Wis. 463.

[9] Dodge *v.* Coffin, 15 Kan. 277.

[10] Keppel *v.* Petersburg R.R. Co., Chase's Dec. (U. S. C. C.) 167.

[11] Turner *v.* Patton, 49 Ala. 406.

[12] Ashley *v.* Martin, 50 Ala. 537.

[13] Rodgers *v.* State, 50 Ala. 102.

[14] State *v.* Bowen, 16 Kan. 475; Bank *v.* Bryant, 13 Bush (Ky.), 419.

[15] Banks *v.* Burnham, 61 Mo. 76.

[16] Cutler *v.* Caruthers, 48 Cal.178.

[17] Dorman *v.* State, 56 Ind. 454.

[18] Spencer *v.* Curtis, 57 Ind. 221.

[19] Mandere *v.* Bonsignore, 28 La. An. 415.

road company,[1] unless they are in terms made public acts. A court will take judicial notice of the accuracy and genuineness of its own record.[2] A State court will not take judicial notice of proceedings in a federal court,[3] nor that any person is an officer, unless he is elected or appointed under some public statute;[4] but it will take judicial notice of government surveys of land, and also of blocks and lots in towns and cities.[5] So that the termini of a turnpike road laid out under a statute so requiring are within a certain county, and that a road running from one terminus of such turnpike to the other is also within the county.[6] So courts will take judicial notice of the source of the title to all lands within its jurisdiction, where they were all derived from the same source.[7]

In Indiana it is held that the courts will take judicial notice that during and since the civil war the adjutant-general has made records of the muster-rolls of the regiments furnished the United States, and a duly certified copy of such a roll is competent evidence of the enlistment, etc., of a volunteer, in an action by him to recover a bounty; and such copy is competent, although the adjutant-general certifying it is no longer in office.[8]

Evidence in the record that a town has assumed to act as a village corporation, in the passage of ordinances, and the bringing of suit in its corporate village name, and that an offense had been charged as committed within the corporate limits of the "village of" A., was held sufficient to warrant the court in taking judicial notice of the change by said town from its original organization to that under the general law, without proof that all the requirements of the statute had been complied with.[9]

The Supreme Court will take judicial notice of the population of a county according to the last census, in determining

[1] Perry *v.* New Orleans R. R. Co., 55 Ala. 413.

[2] Robinson *v.* Brown, 82 Ill. 279.

[3] Haber *v.* Klauberg, 3 Mo. App. 312.

[4] Alford *v.* State, 8 Tex. App. 546.

[5] Gardner *v.* Eberhart, 82 Ill. 316.

[6] Steinmetz *v.* Versailles, etc., T. Co., 57 Ind. 457.

[7] Smith *v.* Stevens, 82 Ill. 554.

[8] Monroe County Comm'rs *v.* May, 67 Ind. 562.

[9] Doyle *v.* Bradford, 90 Ill. 416.

in which class it is placed by the constitution, in order to regulate the fees of the clerks of the Circuit Court.[1]

Where a public act expressly recognizes and amends a private act, courts will take judicial notice of the existence and duties of an office provided in the latter.[2]

Judicial notice is taken of the custom of mutual credits under which business houses furnish each other's clerks, or customers, with goods, and charge them to each other.[3]

Courts do not take judicial knowledge of the local customs which, under the United States statute, entitle prior possessors to a right to use water for mining purposes, etc.; the claimant must allege and prove the custom.[4]

Sec. 192. Matters of Common Experience.

Courts will take judicial notice of all matters that are a part of the experience and common knowledge of the day ;[5] as that certain provinces are in a foreign country, and that they have governments and courts, and that their courts proceed according to the usual course of the common law ;[6] but not when the government has not recognized such foreign province ;[7] but it will take judicial notice of the existence of such province, whether it has been recognized by the government under whose jurisdiction it acts or not.[8] So of wars in which this government is engaged, whether domestic or foreign ;[9] but not of wars in which foreign countries are engaged ;[10] nor of articles of war unless published under authority of the government ;[11] of the political divisions of the country and the location of States ;[12] where the principal rivers of the State lie, what sections they traverse, and what towns or cities

[1] Worcester Bank *v.* Cheney, 94 Ill. 430.

[2] Lavalle *v.* People, 6 Ill. App. 157.

[3] Cameron *v.* Blackman, 39 Mich. 108.

[4] Lewis *v.* McClure, 8 Or. 273.

[5] Oppenheim *v.* Wolf, 3 Sandf. Ch. (N. Y.) 571.

[6] Lazier *v.* Westcott, 26 N. Y. 146 ; Cooke *v.* Wilson, 37 Eng. Law & Eq. 361.

[7] Grierson *v.* Eyrie, 9 Ves. 347.

[8] Taylor *v.* Barclay, 2 Sim. 213.

[9] Dolder *v.* Huntingfield, 11 Ves. 292.

[10] Rex *v.* De Berenger, 3 M. & S. 67.

[11] Rex *v.* Withers, 5 T. R. 442.

[12] Price *v* Page, 24 Mo. 65 ; City Council of Montgomery *v.* M. & W. Plank Road Co., 31 Ala. 79.

they lie in ;[1] of the geographical position of falls on public navigable rivers, and whether there are or not pilots appointed on it ;[2] that other States have constitutions, and of their provisions.[3]

The United States courts will take notice of the situation of a port in a foreign country, and what impediments, if any, exist in its entrance, and whether vessels of a certain draft can enter it.[4]

Sec. 193. Statutes and Common Law of other States.

While courts will take judicial notice of all the public statutes and laws of the State, yet they will not take judicial notice of the statutes or common law of another State, but any person relying upon such statute or common law of another State must prove them, as any other fact is proved.[5]

But where an action is brought upon the judgment of another State, courts will take judicial notice of the laws of such State, so far as relates to the judgment.[6]

In the absence of allegations or proof to the contrary, courts will presume that the laws of another State or country are similar to those in the State in which the action is tried, and if different, the party relying upon the distinction must prove what the law really is in the State, the benefit of whose laws he invokes.[7]

[1] City Council of Montgomery *v.* M. & W. Plank Road Co., *ante.*

[2] Cash *v.* Clarke & Co., 7 Ind. 227.

[3] Butcher *v.* Brownsville, 2 Kan. 70.

[4] The Peterhoff, Blatchford's Prize Cases, 463.

[5] Chumasero *v.* Gilbert, 24 Ill. 293 ; Wood *et al. v.* O'Connor, 28 Vt. 776 ; Rape *v.* Heaton, 9 Wis. 328 ; Charlotte *v.* Choteau, 25 Mo. 465 ; Stokes *v.* Macken, 61 Barb. (N. Y.) 145 ; Heathorn *v.* Shepherd, 1 Blackf. (Ind.) 159 ; Anderson *v.* Anderson, 25 Tex. 637 ; Candit *v.* Blackwell, 4 Green (N. J.), 193 ; Brimhall *v.* Van Campen, 8 Minn. 13 ; Bemis *v.* McKenzie, 13 Fla. 553.

[6] Paine *v.* Schenectady Ins. Co., 11 R. I. 411. But see Hobbs *v.* Memphis, etc., R. R. Co., 9 Heisk. (Tenn.) 873.

[7] Bemis *v.* McKenzie, 13 Fla. 553 ; Taylor *v.* Boardman, 25 Vt. 581 ; Stokes *v.* Macken, 62 Barb. (N. Y.) 145 ; Anderson *v.* Anderson, 23 Tex. 639 ; Folk *v.* Folk, id. 653 ; Carey *v.* R. R. Co., 5 Clarke (Iowa), 357 ; Fellows *v.* Menasha, 11 Wis. 558 ; Rape *v.* Heaton, 9 Wis. 328 ; Simms *v.* Express Co., 38 Ga. 129 ; Hoyt *v.* McNill, 13 Minn. 390 ; Stevens *v.* Boomer, 9 Humph. (Tenn.) 546 ; Temple *v.* Hager, 27 Cal. 163 ; Hammond *v.* Inloes, 4 Md. 138 ; Palfrey *v.* Portland, etc., R. R. Co., 4 Allen (Mass.), 55.

But when the laws of the State in which the trial is had recognize official acts done under the laws of another State, the courts of the State recognizing such acts will take judicial notice of the laws of such other State, so far as is necessary to determine the validity of the acts alleged to be in conformity with them.[1] So when the statutes of another State upon a particular matter have been made the subject of a judicial decision in a State, the courts of such State will take judicial notice of it, and if the statute has been repealed or altered, proof of such repeal or alteration must be duly made.[2] But the presumption that other States have adopted the same laws does not extend to laws imposing a penalty or forfeiture.[3]

When laws are unwritten, they may be proved by parol; but when written as statute laws, they must be proved by the production of the laws themselves.[4]

When the statute of another State has been incorporated into an act of congress, it will be recognized without other proof;[5] or when the laws of one State or nation are, or ever have been, operative in another, as where a State has formerly wholly or in part been under the jurisdiction and laws of another State, the laws then in existence need not be proved. So, too, where the State has formerly been under the jurisdiction of a foreign government. Thus, where a State has formerly been under Spanish or Mexican government, the courts of such States will judicially notice the laws of such governments in force at that time, so far as necessary in the action pending before it.[6] So courts will take judicial notice of all public bodies incorporated by the State,[7] or of all acts of incorporation made public by statute.[8]

[1] Carpenter *v.* Dexter, 8 Wall. (U. S.) 513.

[2] Graham *v.* Williams, 21 La. Ann. 594.

[3] Hull *v.* Augustine, 23 Wis. 383; Campion *v.* Kille, 2 McCarter (N. J.), 476; Cutter *v.* Wright, 22 N. Y. 472; Billingsby *v.* Dean, 11 Ind. 331.

[4] Taylor *v.* Runyan, 9 Iowa, 522; Stevens *v.* Boomer, 9 Humph. (Tenn.) 546; Crosby *v.* Huston, 1 Tex. 203; Brimhall *v.* Van Campen, 8 Minn. 13; Woodward *v.* O'Connor, 28 Vt. 776.

[5] Flannigan *v.* Washington Ins. Co., 7 Penn. St. 306; United States *v.* Turner, 11 How. (U. S.) 663; United States *v.* Phila. & N. O., id. 684.

[6] Doe *v.* Eslaner, 11 Ala. 1028; Choteau *v.* Pierre, 9 Mo. 3; Ott *v.* Soulard, id. 581.

[7] Jones *v.* Fales, 4 Mass. 245.

[8] Russell *v.* Branham, 8 Blackf. (Ind.) 277.

The common law of all the States is presumed to be the same, and if different, it must be proved by the evidence of some person familiar with it.[1] Or the court *may* act upon its own knowledge of the law of another State, and if it errs as to its knowledge thereof, the judgment will be reversed.[2] But the United States courts are presumed to know the laws of the several States, and will take judicial notice thereof.[3]

In the case of isolated and peculiar nations not holding diplomatic relations with this country, parol evidence will be received as to its laws, but such evidence will only be allowed as conclusive when it is so direct and positive as to leave no doubt or ambiguity.[4] State courts will take judicial notice of all public acts of congress, and pamphlets issued by government containing them may be read;[5] and of laws relating specially to the State in which thet rial is had;[6] and of all treaties made with foreign governments, and of the power of the president under the same, but not whether the powers under it have been exercised.[7] So of the survey of lands in the State under acts of congress, and the dedication of portions of them to certain purposes.[8] Whether courts will take judicial notice of acts of congress relating only to the District of Columbia *quere*.[9] And when a transaction otherwise lawful is unlawful by reason of provisions in acts of congress, the court will dismiss the action, even

[1] Warner *v.* Lusk, 16 Mo. 102; Nunno *v.* Davis, 7 Tex. 26; Bemis *v.* McKenzie, 13 Fla. 553; Stokes *v.* Macken, 62 Barb. (N. Y.) 145.

[2] State *v.* Delesdinier, 7 Tex. 26.

[3] Jasper *v.* Porter, 2 McLean (U. S.), 579; Merrill *v.* Dawson, Hunt (U. S.), 563; Jones *v.* Hays, 4 McLean (U. S.), 521; Wadsworth *v.* Spafford, 2 id. 168.

[4] Wilcox *v.* Phillips, Wallace, Jr. (U. S.) 47.

[5] Hammond *v.* Inloes, 4 Md. 138; White *v.* Guirons, Minor (Ala.), 331; Temple *v.* Hagar, 27 Cal. 163; Anonymous, Buller's N. P. 222; Burmand *v.* Nirat, 1 C. & P. 578; Bird *v.* State, 21 Gratt. (Va.) 800; Adm'r *v.* Chubb, 16 Gratt. 284; Wright *v.* Hawkins, 18 Tex. 452; Buchanan *v.* Whitman, 36 Ind. 257.

[6] Papin *v.* Ryan, 32 Miss. 21.

[7] Dale *v.* Wilson, 16 Minn. 525; Carson *v.* Smith, 5 id. 78; Montgomery *v.* Duley, 3 Wis. 709.

[8] Dickenson *v.* Bruden, 30 Ill. 279; Atwater *v.* Schenck, 8 Wis. 160.

[9] Adm'r *v.* Chubb, 16 Gratt. (Va.) 284, yes; Wright *v.* Paton, 10 Johns. (N. Y.) 300, no.

though the point is not raised by the defense.[1] So, too, courts will take judicial notice of the laying out and surveying of lands under acts of congress, and of the method of their boundaries and descriptions ;[2] and of the geographical divisions of the State when necessary to the determination of a question.[3] Courts are bound to known the rules of the Court of Chancery ;[4] so its own rules ;[5] but not the rules of another court ;[6] nor of a scale of fees adopted by it under the provisions of a statute.[7]

Nor of the rules and regulations adopted by any public board or body, whether national or State, but such regulations, if relied upon, must be proved.[8] Nor of the rules or regulations of any church or society.[9] Nor of the customs or regulations of any particular trade.[10] Courts will take judicial notice of the time when State and national laws go into effect.[11] So of their repeal, or any changes therein.[12] All acts found among the public laws, bearing the governor's signature, are presumed to have been constitutionally passed.[13]

All acts of the legislature are presumed to have been constitutionally passed, and so far as extrinsic evidence is concerned, this presumption is conclusive.[14]

But in Illinois it is held that the contrary may be proved by the production of a duly certified copy of the legislative

[1] Kessel *v* Albertis, 56 Barb. (N. Y.) 362.

[2] Buchanan *v.* Whiteman, 36 Ind. 25 ; Atwater *v.* Schenck, 9 Wis. 160 ; Dickenson *v.* Breeden, 30 Ill. 279.

[3] Hinckley *v.* Beckwith, 23 Wis. 328 ; Fancher *v.* De Montague, 1 Head. (Tenn.) 41 ; Mossman *v.* Forrest, 27 Ind. 333 ; Commissioners *v.* Spetter, 13 Ind. 235 ; Winnepisseogee Lake Co. *v.* Young, 40 N. H. 420 ; King *v.* Kent, 29 Ala. 542 ; Martin *v.* Martin, 51 Me. 366 ; Gilbert *v.* Moline, 19 Iowa, 319 ; Rock Island *v.* Steele, 31 Ill. 543.

[4] Carter *v.* Pratt, 9 Md. 67.

[5] Cherry *v.* Baker, 17 Md. 75; Pugh *v.* Robinson, 1 Tenn. 118.

[6] Scott *v.* Scott, 17 Md. 78 ; Van Sandan *v.* Turner, L. J. (U. S.) 154.

[7] Pilkington *v.* Cooke, 17 L. J. 141.

[8] Hensley *v.* Tarpey, 7 Cal. 288 ; Palmer *v.* Aldridge, 16 Barb. (N. Y.) 131.

[9] Young *v.* Ransom, 31 Barb. (N. Y.) 49.

[10] Dulch &Co. *v.* Mooney, 12 Cal. 534.

[11] State *v.* Bailey, 16 Ind. 46 ; Heuston *v.* Cincinnati, etc., R. R. Co., id. 275 ; Berliner *v.* Waterloo, 14 Wis. 378 ; Attorney-General *v.* Foote, 11 id. 14.

[12] State *v.* O'Connor, 13 La. An. 486.

[13] Ill. Cent. R. R. Co. *v.* Wren, 43 Ill. 77 ; Bedard *v.* Hall, 44 id. 91.

[14] People *v.* Mahany, 13 Mich. 481.

journal, but not by reference to the original journal, as the courts do not take judicial notice of such journals or of their genuineness.[1] So courts take judicial notice of the maritime law.[2] Courts will not take notice of the rates of interest in another country or State, nor in the absence of proof will they presume that interest is allowed upon a contract, note or other obligation, made in such country or State.[3]

The laws of a foreign country, or of another State, may be proved by the testimony of any person who knows them, whether statutory or common law, and the person by whom such proof is made need not be a lawyer, but he must be able to satisfy the court that he is in a position to know them, and the court must be satisfied that he does.[4] The judgments of a court of a foreign country, properly authenticated by the clerk of the court in which they were rendered, and duly certified by the secretary of State, and of the governor of the province with the provincial seal, will be treated as evidence.[5]

Sec. 194. As to Judicial Records.

Courts will take judicial notice of their own records and of their genuineness,[6] and of the records in a case on trial.[7] But they will not in one case take judicial notice of the record in another case pending in the same court.[8] Nor that other suits are pending in the same court involving the same questions.[9] Nor of the pendency of actions in the federal courts to settle the same questions.[10] Nor will they take judicial notice of anything outside the record. Hence when the record does not show that a declaration was filed in the cause, it will not be presumed that one was filed.[11] Nor will

[1] Grab *v.* Cushman, 45 Ill. 119; Coleman *v.* Dobbins, 9 Ind. 156.

[2] Chandler *v.* Graves, 2 H. Blackstone, 606.

[3] Ingram *v.* Drinkard, 14 Tex. 351; Cooke *v.* Crawford, 1 id. 9; Cavender *v.* Guild, 4 Cal. 250; Ramsay *v.* McCawley, 2 Tex. 189.

[4] American Life Insurance Trust Co. *v.* Rosenagle, Weekly Notes of Cases (Penn.), vol. 1, p. 419.

[5] Lazier *v.* Wescott, 26 N. Y. 146.

[6] State *v.* Postlethwaite, 14 Iowa, 446; State *v.* Schilling, id. 455.

[7] Paggett *v.* Curtis, 15 La. Ann. 551.

[8] People *v.* De La Guerre, 24 Cal. 73.

[9] Lake Merud Water Co. *v.* Cowles, 31 Cal. 215.

[10] Vassault *v.* Seitz, 31 Cal. 225.

[11] Dart *v.* Lowe, 5 Ind. 131.

they take judicial notice that a *nolle pros.* or *conviction* was entered by them in an action in another county.[1]

United States courts will take judicial notice that a discharge in bankruptcy has been regularly obtained.[2] Courts will not take judicial notice of the genuineness of the signatures of the parties in a cause.[3]

Sec. 195. Miscellaneous Matters noticed without Proof.

Courts will not take judicial notice of the place of intersection of a street in a city with a railroad track ;[4] nor of the meaning of "C. O. D." :[5] nor that kerosene oil is a refined coal oil or a refined earth oil.[6] But under the rule that courts will take judicial notice of matters well established in the arts and sciences, there seems to be no good reason why they should not judicially know what everybody else knows, that kerosene, an article so extensively used, is a refined coal or earth oil. But there seems to be no fixed rule upon which courts act in determining these questions, but they seem to act according to their peculiar caprices. Thus, in most of the States it is held that courts will take judicial notice that lager beer is a malt liquor and is intoxicating,[7] but in others, although they take judicial notice that whiskey is intoxicating,[8] yet they will not take judicial notice that malt liquors are,[9] and yet the one fact is as generally known and as well established as the other. The United States courts take judicial notice of the character, construction and use of a manufactured article which has been in use for many years, such as an ice-cream freezer, etc.[10] So it has been held that courts will take judicial notice of the art of photography, the mechanical and chem-

[1] State *v.* Edwards, 19 Wis. 674.

[2] Lathrop *v.* Stewart, 5 McLean (U. S.), 167.

[3] Alderson *v.* Bell, 9 Cal. 315.

[4] Pennsylvania Co. *v.* France, 13 Ill. App. 91; People *v.* Callahan, 23 How. (N. Y.) 58. But see Brady *v.* Pope, 59 Cal. 52, and *quere.*

[5] McNichols *v.* Pacific Express, 12 Mo. App. 401. But *contra* see State *v.* Intoxicating Liquors, 73 Me. 278.

[6] Bennett *v.* North British, etc., Ins. Co., 8 Daly (N. Y. C. P.), 471.

[7] State *v.* Gazette, 11 R. I. 592; Adler *v.* State, 55 Ala. 16; Watson *v.* State, 55 id. 158.

[8] Schlicht *v.* State, 56 Ind. 173; Carman *v.* State, 18 Ind. 54.

[9] Shaw *v.* State, 55 Ind. 188; People *v.* Hait, 24 How. Pr. (N. Y.) 289.

[10] Brown *v.* Piper, 91 U. S. 37.

ical process employed, the scientific principles on which they are based, and their results.[1] So, too, they would doubtless take judicial notice that opium, arsenic, prussic acid, etc., are deadly poisons, but the knowledge of these facts is no more general than that kerosene is a coal oil, or that malt liquors are intoxicating. Courts will not take judicial notice of facts not in themselves of judicial cognizance, as that Daniel Webster does not reside in the State of New York,[2] but will take judicial notice that "beer" is a malt and intoxicating liquor,[3] and the same is true as to "ale,"[4] "strong beer,"[5] "lager beer,"[6] or any species of liquors which common experience has demonstrated are intoxicating. The courts will not take judicial notice of the value of an attorney's services in a case tried before it;[7] nor what is a fair and reasonable or usual commission on acceptances;[8] nor of the ordinary abbreviation of *proper* names.[9] But, *contra*, see where it was held that a note signed "Christ. A." would be treated as a note signed "Christopher A.;" but will of ordinary abbreviation of common words, as that "adm'r" stands for "administrator;"[10] but not that "John Smith" and "Hon. John Smith" are the same person;[11] but identity of name is *prima facie* evidence of identity of person,[12] and a certificate of birth, death or marriage from the proper office is admissible as evidence, without proof that the person named in the certificate is the same in reference to whom the certificate is to be used as evidence. The identity of name is *prima facie* proof of identity of per-

[1] Luke *v.* Calhoun Co., 52 Ala. 115.

[2] Wheeler *v.* Webster, 1 E. D. Smith (N. Y. C. P.), 1; Wilkie *v.* Bolster, 3 id. 327.

[3] Briffitt *v.* State, 58 Wis. 39; 46 Am. Rep. 64; People *v.* Whilock, 3 Parker's Cr. (N. Y.) 9.

[4] Nervin *v.* Lader, 3 Den. (N.Y.) 437.

[5] Comm's *v.* Taylor, 21 N. Y. 173.

[6] Rau *v.* People, 63 N. Y. 277; State *v.* Gazette, 11 R. I. 592; Com. *v.* Anthes, 12 Gray (Mass.), 29.

[7] Pearson *v.* Darrington, 32 Ala. 227.

[8] Seymour *v.* Morrow, 11 Barb. (N. Y.) 80.

[9] Weaver *v.* McElhenon, 13 Mo. 89; Stephens *v.* State, 11 Ga. 225; Russell v. Martin, 15 Tex. 238.

[10] Moseley's Adm'r *v.* Masten, 37 Ala. 216.

[11] Ellsworth *v.* Moore, 5 Clarke (Iowa), 486.

[12] Gitt *v.* Watson, 18 Mo. 274.

son, and if not so in fact, the opposite party must prove it.[1] But courts outside the State in which a place is located will not take judicial notice that it is outside the State, as that "New York" is not in the State where the trial is had;[2] or that "New Orleans" is in the State of Louisiana;[3] or that "St. Louis" is in the State of Missouri;[4] or that a note payable at "New Orleans, La.," is payable in New Orleans, State of Louisiana;[5] nor that "Dublin" is in Ireland.[6] But the courts of England do judicially know that "Geelong, Colony of Victoria," is a place outside of England.[7] Forms of attestation in other States must be proved.[8] Quantities of land contained in certain courses and distances must be shown.[9] Courts will not take judicial notice that a woman past 49 years of age is past child-bearing.[10] Courts will not recognize a private seal, whether of an officer or a private person.[11] They will take notice of the seasons, and of the time when certain agricultural products mature, and when the season of harvesting arrives,[12] but not of the vicissitudes incident thereto.[13] So of the ordinary course of transactions of human life, and whatever ought generally to be known, as the peculiar nature of lotteries and how they are generally carried on.[14] But this is so only when the lotteries exist by virtue of State laws. The age of a person, if material, must be proved.[15] On the trial of an issue directed by a court of equity, the judge before whom the trial is had will take judicial notice of the terms of the order.[16] So of the day of the week on which a certain day of the month was;[17] that a child born two months after marriage, when the hus-

[1] Hubbard *v.* Lees, L. R. 1 Exchq. 255.

[2] Bradshaw *v.* Mayfield, 18 Tex. 21.

[3] Riggins *v.* Collier, 6 Mo. 568.

[4] Ellis *v.* Park, 8 Tex. 205.

[5] Russell *v.* Martin, 15 Tex. 238.

[6] Kearney *v.* King, 1 Chit. 28.

[7] Cooke *v.* Wilson, 1 C. B. (N. S.) 153.

[8] Trigg *v.* Conway, 1 Hemp. (Tenn.) 538.

[9] Tison *v.* Smith, 8 Tex. 147.

[10] Overhill's Trusts, *In re*, 17 Eng. Law. & Eq. 323.

[11] Beach *v.* Workman, 20 N. H. 379; Barrett Nav. Co. *v.* Shower, 8 Dowl. (C. P.) 173; Ill. Cent. R. R. Co. *v.* Johnson, 40 Ill. 35.

[12] Floyd *v.* Ricks, 14 Ark. 286.

[13] Dixon *v.* Nichols, 39 Ill. 372.

[14] Boullemet *v.* State, 28 Ala. 83.

[15] Stephenson *v.* State, 28 Ind. 27.

[16] Wood *v.* Thompson, 1 C. & M. 171.

[17] Hanson *v.* Shackleton, 4 Dowl. (P. C.) 48.

band had not access to the mother before marriage, is not his child ;[1] on what day the king died ;[2] of the general law of bankers, and that they have a lien on the securities of their customers for advances made or services rendered ;[3] that rain falls.[4] Courts will not take judicial notice of what is meant by the words "whaling voyage" in a policy of insurance,[5] but it will of the meaning of words in certain usual and common combinations.[6]

Sec. 196. Rule when Statutes are relied on as Ground of Action or Defense.

If a party relies upon a statute either as a ground of action or defense, he must, notwithstanding the fact that it is a public statute of which the court takes judicial notice, set forth in his declaration, or in his pleadings, such facts as bring him clearly within the provisions of the statute, or if in defense, where no special plea is required, show such facts as bring his case within the statute, and if there are any exceptions or provisos in the act, he must show negatively that the matter pleaded is not within the provisos or exceptions,[7] unless the proviso or exception is in a subsequent substantive clause or statute, and is not connected with the enacting clause by any word of reference, in which case it is a matter of defense for the other party, and need not be negatived in the pleadings.[8] Where the enacting clause of a statute makes an exception to the general provisions of the act, a party pleading the provisions of the statute must negative the exception, *but* when the exception is contained in a proviso, *and not in the enacting clause*, the party pleading the statute need not negative the exception. *It is for the other party to set it up in avoidance of the other provisions of the statute.*[9] A pleading setting forth the cause of action

[1] Rex *v.* Luffe, 8 East, 202.

[2] Henry *v.* Cole, 2 Ld. Raym. 811.

[3] Barnett *v.* Brandon, 6 M. & G. 630.

[4] Fay *v.* Prentice, 14 L. J. (N. S.) 298.

[5] Child *v.* Sun Mutual Ins. Co., 3 Sandf. (N. Y.) 26.

[6] Bap. Church *v.* Brooklyn Fire Ins. Co., 28 N. Y. 153; Downs *v.* Sprague, 2 Keyes, 57.

[7] Gill *v.* Scrivens, 7 Durnford & E. 27.

[8] Rex *v.* Jukes, 8 D. & E. 542; Rex *v.* Hall, 1 id. 320; Steele *v.* Smith, 1 B. & Ald. 94.

[9] Muller's Case, 4 Ct. of Claims (U. S.), 61; McGlone *v.* Prosser, 21

or defense in the language of the statute relied on, is sufficient,[1] and he need set forth no more facts or circumstances than are necessary to support the pleading under the statute.[2]

There is still another matter which should be borne in mind, and that is, that where a statute gives a remedy where none existed at common law, or where it makes an act lawful which is not so regarded at common law, the party must state in his pleadings, and show upon the trial such a state of facts as brings his case clearly within the provisions of the statute as well as all the amendments thereto. But where the statute is only declaratory of a common-law right, and in aid thereof, unless it in some way varies the standing or rights of parties in court, the statute, or any circumstances bringing the party within the provisions thereof, need not be stated in the pleadings, but otherwise when the statute gives any rights additional to the common-law right, or varies or changes the *status* of the parties.[3]

In actions brought upon a general or public statute, the declaration should state such facts as bring the case within the statute, and should state that the act complained of is contrary to the statute in such cases made and provided;[4] but if the facts and circumstances set forth in the pleading are sufficient to show that the act charged is in point of fact contrary to the statute relied on, the omission of the words "contrary to the form of the statute," will not be treated as a defect.[5] It is the *substance*, and not the form of the pleading, that controls,[6] and the statute need not be set forth or named in the pleadings, as the courts are bound to take judicial notice of the statute, and whether the facts set forth in the pleadings are sufficient to sustain an action or defense under it.[7]

If the action or defense is predicated upon the statute of

Wis. 273; Lynch *v.* People, 16 Mich. 472.

[1] Gunter *v.* Dale Co., 44 Ala. 639.

[2] Hewitt *v.* Harvey, 46 Mo. 368.

[3] Note 2 to Dupa *v.* Mayo, 1 Wm. Saunders, 276; Erlinger *v.* Bouceau, 51 Ill. 94; Ryan *v.* State, 32 Tex. 280; Hastings *v.* Cunningham, 39 Cal. 137.

[4] Lee *v.* Clarke, 2 East, 332.

[5] Hewett *v.* Harvey, 46 Mo. 368.

[6] State *v.* Dehlinger, 46 Mo. 106.

[7] McHarry *v.* Eastman, 7 Rob. (N. Y.) 137.

another State, the statute relied upon must be set forth with distinctness, so that the court can say upon inspection of the plea what the effect of the law is, and a pleading that simply avers that by the laws of the State where the contract was made, certain results would ensue, is not an averment sufficient to support any proof as to what the fact is.[1]

In all actions brought upon a private statute, the act must be recited, and such facts stated as disclose a right of action under it, and no more of the act will be noticed by the court than is set forth in the declaration; and the same is equally true as to the pleadings where the statute is relied upon in defense to an action.[2]

In all cases where the statute is set forth either in the declaration or pleadings, great care should be observed to set it forth correctly, as in the case of a misrecital of a general statute advantage may be taken of it either by general demurrer, motion in arrest, or by writ of error, if the erroris in any wise material, and the defect is not cured by verdict. But it seems that the misrecital must be of matter which goes to the ground of the action, or the defect will be cured by verdict.[3]

In the case of a material misrecital of a public act, the court cannot give judgment even with the consent of the parties, for the reason that the courts are bound to take notice of allpublic acts, and to know that the statute is not as set forth in the pleadings.[4]

So, too, care should be taken never to recite a public statute when its recital is unnecessary, for if it is recited, and incorrectly set forth, the misrecital is fatal if in a material matter;[5] for if a party undertakes to set forth a statute in his pleading, a misrecital is fatal.

[1] Hoyt *v.* McNeil, 13 Minn. 390; Roots *v.* Merriweather, 8 Bush (Ky.), 397.

[2] Kirk *v.* Nowell, 1 D. & E. 125; Hewett *v.* Harvey, 46 Mo. 106; Gunter *v.* Dale Co., 44 Mo. 639.

[3] Rex *v.* Marsack, 6 D. & E. 776.

[4] Love *v.* Walton, Cro. Eliz. 245. See also State *v.* Jarrett, 17 Mo. 309, where it was held that where a bill in equity contradicts the provisions of a public statute, the court will take judicial notice thereof, although the question is not raised upon trial.

[5] Boyce *v.* Whittaker, Doug. 97.

But if the misrecital is immaterial or only a trifling variance, the rule is otherwise,[1] as if a party refers to the wrong section of a public act in his pleading, which is evidently a clerical error, it is wholly immaterial, as the court is bound to take judicial notice of the statutes, and hence is bound to know whether the facts set forth are a ground of action or defense *under any part of the statute;* but if the party recites the portion of the statute in his plea, the rule would be otherwise.[2]

In all cases where the action or defense is predicated upon a private act, so much of the act as is relied on must be accurately set forth in the pleadings, and it is generally better to set it forth *in hæc verba*, and if there is a misrecital of the act, advantage must be taken of it by pleading *nul tiel record*, or by demurrer, as the court can take judicial notice of no more of the act than is recited in the pleadings.[3] *Nul tiel record* should not be pleaded when the defect is in reference to such matters as the court judicially notices, but only of such defects as go to the matter or substance of the act; all other defects should be taken advantage of by demurrer.[4]

Public acts need not be proved, as the courts are bound to know their provisions; but if *nul tiel record* be pleaded private acts must be proved by an exemplified copy of the, act,[5] or by the production of a printed copy thereof, printed by the State printer.[6] When a private act is duly certified under the seal of the State, it cannot be impeached by the legislative journals.[7] And it is not competent for the court in an ordinary civil suit *inter partes* to permit any inquiry to be made into the correctness of the Revised Statutes duly certified and deposited in the office of the secretary of State, and that such statutes, so certified, import absolute verity, as the records of the legislature.[8]

[1] Goodwin *v.* West, Cro. Car. 522; Anonymous, 2 Ventris, 215.

[2] McHarvy *v.* Eastman, 7 Robt. (N. Y.) 137.

[3] Spring *v.* Eve, 2 Mod. 241; Platt *v.* Hill, 1 Ld. Raymond, 382.

[4] Rex *v.* Wilde, 1 Lev. 296; Boyce *v.* Whittaker, Doug. 97. See also Moulson *v.* Redshaw, 1 Saund. 193, where the practice in reference to pleading private acts is thoroughly discussed.

[5] Anonymous, 2 Salk. 566.

[6] Rex *v.* Shaw, 12 East, 497.

[7] Rex *v.* Arundel, Hob. 110.

[8] Eld *v.* Gorham, 20 Conn. 8.

Public acts, being general laws, are presumed to be known to every person, as well to the jury as to the court, and need not be proved; but private acts must be proved by a duly exemplified copy,[1] or by a copy printed by the king's printer and under authority.[2] And this extends to laws of a foreign country when they are found in the statutes of that country, accompanied with proof of their official publication;[3] and the laws of another State.[4] But the book must be authenticated under the seal of the secretary of State.[5]

[1] 1 Phillips on Ev. 364; 1 Starkie on Ev. 163.

[2] Rex *v.* Shaw, 12 East, 479.

[3] O'Keefe *v.* United States, 5 Ct. of Claims, 674.

[4] Zimmerman *v.* Helsler, 32 Md. 274.

[5] Babcock *v.* Babcock, 46 Mo. 243.

CHAPTER XVII.

BURDEN OF PROOF.

SECTION.

197. General Objects of Evidence.
198. Frauds.
199. Exceptions to Rule.
200. Presumption of Innocence.
201. Burden in Case of Lost Notes.
202. Who is to Begin.
203. Who Begins in action to Recover Lands.
204. Right to Reply.

Sec. 197. General Object of Evidence.

The object of evidence is to establish the issues between the parties, and to this end three general rules must be observed: 1st, *the evidence must be confined to the issue;* 2d, *only the substance of the issue need be proved,* and 3d, that *the burden of proof lies upon the party asserting an affirmative fact,* unless it is supported by some adequate presumption.[1] This must, however, be understood as applying to a material and substantial issue, and is a rule which rests upon the broad ground of protection to the rights of parties, and has for its base that sound public policy which courts ever regard with strict exactness. Mere convenience either of parties or courts is not generally allowed to weigh against actual rights, and the better reason for the rule would seem to be, that when a person, by an allegation in his declaration or plea, asserts that which, if true, shows a legal right in him to recover damages of another, or which shows a legal and valid excuse against an apparent legal claim, public policy

[1] Pussey *v.* Wright, 31 Penn. St. 387; Costigan *v.* Mohawk, etc., R. R. Co., 2 Den. (N Y.) 609; Powers *v.* Russell, 13 Pick. (Mass.) 69; Kyle *v.* Colmes, 2 Miss. 121; Thompson *v.* Lee, 8 Cal. 275; Nash *v.* Hall, 4 Ind. 444; Stevenson *v.* Maroney, 29 Ill. 582.

and the protection of the rights of parties require that the party making such an allegation should take the burden of its support, otherwise the rights of parties would be in constant jeopardy by their being compelled to disprove issues without foundation or validity. It is true that there is said to be a distinction between the burden of proof and the weight of evidence; but this distinction is often theoretical rather than practical, and involves so much nicety in its adjustment and determination as to be of comparatively little value in the protection of the rights of parties. The burden of proof generally rests constantly upon the party upon whom it rests in the first instance, but the *weight* of evidence is said to depend upon its *value* and apparent strength in proving or disproving the issue. In fact, the two are so closely and intimately blended, that the distinction is not easily seen. A party having the burden of proof does not maintain the issue, except the proof be such, and its strength and value of that character, which convinces a court or jury of his right to recover. Failing in that, the task he took upon himself has not been performed, and the opposite party is entitled to a verdict. It is true that courts in their discretion will sometimes set aside verdicts as being against the weight of evidence, but all reasonable intendments are to be made in support of the verdict, and it is only in cases where the verdict is so apparently opposed to the weight of evidence as not to be in any sense fairly supported by it that any relief can be had; so that strictly the artificial distinction between the burden of proof and weight of the evidence is generally of but little practical value, and, in fact, it may be said that really there is no distinction. It is difficult to understand how such a distinction can exist in view of the fact that the party who takes the burden of proof is bound to maintain the issue by a fair preponderance of proof, and this certainly means that the *weight* of evidence shall be with him. Indeed, it is a well-settled rule of law that in a case where the testimony is so evenly balanced as not to admit of a conclusion being drawn from it, the verdict must be against the party upon whom the burden of proving the issue rests.

The real test by which to determine upon whom the burden of proof lies is to be found by ascertaining which party would be entitled to a verdict if no proof was offered on either side, for the burden lies upon him against whom the verdict should be given in such a case;[1] and when the burden lies upon a party, he is bound to prove each and every circumstance essential to charge the other party in the same manner as if the whole issue rested upon him, whether plaintiff or defendant;[2] and the issue must be supported by him by a fair balance of evidence, so that a conclusion can fairly be drawn in his favor by the jury, or the verdict must be for the other party.

If the burden of proof lies upon the plaintiff or defendant, it cannot be changed and thrown upon another by the form of pleading.[3] Indeed, it is never the *form*, but the substantive allegations, of the pleadings that determine the burden of proof,[4] and while in civil actions the burden of proof may be shifted in certain cases, yet in criminal cases this never occurs except when the respondent attempts to justify his crime.[5]

As illustrative of the rule, if A. sues B. in an action for personal injuries received by him by reason of some act negligently done by B., the burden is upon A. to prove all the facts essential to show that B. was really guilty of negligence as charged by A. in his declaration; and B. is not required to put in negative proof unless these facts are legally established, that is, established by full proof of negligence, such as would render him liable for the results charged. When the proof of A. is all in, in those States in which a nonsuit is permissible without the consent of the parties, the remedy is to move for a nonsuit on the ground that the evidence fails to support the declaration; but in those States where the courts, by statute, are not permitted to nonsuit the plaintiff,

[1] Veiths *v.* Hagge, 8 Iowa, 163; Kent *v.* White, 27 Ind. 390; Ford *v.* Simmons, 13 La. Ann. 397.

[2] Spaulding *v.* Harvey, 7 Ind. 429; Henderson *v.* State, 14 Texas, 403; Brandon *v.* Cabiness, 10 Ala. 155.

[3] State *v.* Melton, 3 Mo. 417.

[4] Loring *v.* Steinman, 1 Met. (Mass.) 204.

[5] Com. *v.* Dana, 2 Met. (Mass.) 329; Com. *v.* Kimball, 24 Pick. (Mass.) 336.

the remedy should be sought by moving for a verdict for the defendant upon the ground that the evidence is not sufficient to sustain the declaration. In a Massachusetts case,[1] the court expressly held that it was incumbent upon him who takes the affirmative of an issue, whether under a declaration or plea, to maintain the issue raised by him by competent proof; and where the burden lies upon one party of proving an issue, he cannot change it or throw it upon the other party by any system of pleading.[2] Thus, in an action for the non-performance of a contract, the burden is upon the plaintiff to prove the non-performance by full proof, and failing in that, the defendant is entitled to a verdict.[3] So where a breach of the performance of a contract is alleged by a declaration or plea, the party setting it up is charged with the burden of proving it.[4]

A defendant setting up matter in mitigation of damages, takes the burden of establishing fully the mitigating circumstances relied on;[5] so where matter in justification is plead,[6] or matter in avoidance,[7] or in bar.

Where a defendant, in an action on a promissory note by an indorser, denies that the note has been indorsed to the plaintiff before maturity, and therefore claims the benefit of any equities attaching in his favor against the payee, he takes the burden of proving the allegation, and the plaintiff is not bound to show when the indorsement was in fact made, the law, in the absence of proof, presuming that it was made before maturity.[8] The same is also true when the defendant sets up in his plea that the payee of the note is not the owner of the same, but has indorsed it to another who is the real owner;[9] so where want of consideration is alleged, the burden rests upon the defendant to establish it, the law pre-

[1] Loring *v.* Steinman, 1 Met. (Mass.) 204.

[2] State *v.* Melton, 8 Mo. 417.

[3] McGregory *v.* Prescott, 5 Cush. (Mass.) 67.

[4] Edmonds *v.* Edmonds, 1 Ala. 401.

[5] Murrell *v.* Whiting, 32 Ala. 54.

[6] Winans *v.* Winans, 19 N. J. 220.

[7] Gray *v.* Gardner, 17 Mass. 188; Brown *v.* Woodbury, 5 Ind. 254; Attleborough *v.* Middleborough, 10 Pick. (Mass.) 378; Jewett *v.* Davis, 6 N. H. 518.

[8] Hopkins *v.* Kent, 17 Md. 113; Davis *v.* Bartlett, 12 Ohio St. 534.

[9] Vanbuskirk *v.* Levy, 3 Met. (Ky.) 133.

suming, where a consideration is expressed therein, that it was given for a full and valid consideration, until the contrary is proved ;[1] so where the consideration is claimed to be illegal[2] or usurious ;[3] and this must be by strict proof, and evidence is not admissible to prove that the party making the loan is a usurer ;[4] so where a note is sued upon, purporting to be signed by an agent, the burden of proof is on the defendant to show want of authority.[5]

When the holder of a note seeks to avoid want of protest and notice to the indorser, the burden is on him to establish the waiver of notice or other legal excuse or a promise to pay with full knowledge of his non-liability ;[6] so the burden of establishing payment of a note or performance of an admitted contract is on the defendant.[7]

An alteration in a note, mortgage or other written contract or evidence of indebtedness must be explained by the person benefited by the alteration, as the law presumes, in the absence of proof to the contrary, that the original contract without alteration expresses the real intention of the parties.[8]

If a party sets up matter in avoidance[9] or justification,[10] or special matters in defense, the burden rests upon him to establish the facts requisite to support his plea,[11] as want of

[1] Gilbert *v.* Duncan, 29 N. J. L. 521 ; Quimby *v.* Morrill, 47 Me. 470 ; Thomas *v.* Quick, 5 Blackf. (Ind.) 334 ; Towsey *v.* Shook, 3 id. 267.

[2] Brigham *v.* Potter, 14 Gray (Mass.), 522 ; Trustees *v.* Hill, 12 Iowa, 462 ; Solomon *v.* Dreschler, 4 Minn. 278 ; Dykers *v.* Townsend, 24 N. Y. 57 ; Craig *v.* Proctor, 6 R. I. 547 ; Kidder *v.* Norris, 18 N. H. 532.

[3] Ives *v.* Farmers' Bank, 2 Allen (Mass.), 236 ; Engler *v.* Ellis, 16 Ind. 475 ; Hale *v.* Hazleton, 21 Wis. 320.

[4] Jackson *v.* Smith, 7 Cow. (N. Y.) 717.

[5] Thompson *v.* Abbott, 11 Iowa, 193.

[6] Ballin *v.* Betske, 11 Iowa, 204.

[7] Caulfield *v.* Sanders, 17 Cal. 469 ; McKinney *v.* Slack, 15 N. J. L. 220 ; Edmonds *v.* Edmonds, 1 Ala. 401 ; Irwin *v.* Gernon, 18 La. Ann. 228 ; McLendon *v.* Hamblin, 34 Ala. 46 ; Buzzell *v.* Snell, 25 N. H. 474.

[8] Van Horn *v.* Bell, 11 Iowa, 465 ; Hill *v.* Cooley, 46 Penn. St. 256 ; Smith *v.* United States, 2 Wall. (U. S.) 219.

[9] Brown *v.* Woodbury, 5 Ind. 254 ; Attleborough *v.* Middleborough, 10 Pick. (Mass.) 378 ; Gray *v.* Gardner, 17 Mass. 188.

[10] Winans *v.* Winans, 19 N. J. Eq. 220 ; Treadwell *v.* Joseph, 1 Sum. (U. S.) 390.

[11] Great Western R. R. Co. *v.* Bacon, 30 Ill. 347 ; Vail *v.* McKernan, 21 Ind. 421 ; Pack *v.* Chapman, 16 La. An. 397 ; The Short Staple, 1 Gall. (U. S.) 104 ; The Argo, 1 id. 150.

consideration where a consideration is expressed in or implied from the contract,[1] usury[2] and other similar defenses. But the rule is otherwise as to pleas of the Statute of Frauds, limitations and defenses of that character,[3] and the plaintiff is bound to show facts which avoid the effect of the plea.

It may be said that in all cases the *onus probandi* rests upon the party who is obliged to free himself from liability by proving a fact, when the knowledge of that fact is supposed to be more within his reach than that of his adversary.[4] Where a party is seeking a recovery upon the ground that the defendant did not discharge a statutory duty, the burden is upon him to show that such duty was not discharged. Thus, where a statute provides that a railway company is required to ring the bell *or* blow the whistle of the locomotive within a certain distance of a highway crossing, a party seeking a recovery for an injury at a crossing upon the ground that this duty was not discharged, must show that neither the whistle was blown nor the bell rung as required by the statute; and if it is only shown that the whistle was not blown, no recovery can be had, because the company had its election to blow the whistle or ring the bell, and in the absence of proof to the contrary, if it is only shown that the whistle was not blown, it will be presumed that the bell was rung.[5]

In assumpsit, account or actions of book account to recover a balance due upon accounts, the burden rests upon the plaintiff to establish the accuracy of his accounts, and the fact that the articles charged were delivered to the defendant. In some of the States, the books of account are held to be *prima facie* evidence of the sale, delivery, etc., but in others, if the person making the charge is still living, he must be produced as a witness, or the fact of delivery established by other evidence.[6] In the case of merchants' accounts,

[1] Pack *v.* Chapman, 16 La. An. 366.

[2] Hale *v.* Haselton, 21 Wis. 820.

[3] Taylor *v.* Spears, 6 Ark. 381.

[4] Forde *v.* Simmons, 13 La. An. 397.

[5] Cathcart *v.* Hannibal, etc., R. R. Co. (Mo. S. C., 1885), 11 Western Rep. 401.

[6] See *ante*, p.

if a statement has been sent to the defendant, and he did not object thereto within a reasonable time, it is presumed to be correct ;[1] and such also is held to be the rule as to accounts current, or accounts in the ordinary course of business.[2] If accounts have been settled and a balance agreed upon, if a mistake is claimed to have been made, the burden of proof is on the party seeking to open the account ;[3] but when a party claims that accounts have been liquidated, the burden is upon him to establish it. Thus where to a plea of the Statute of Limitations the plaintiff replied that the accounts were merchants' accounts, and the defendant rejoined that the accounts were not open and current, but were liquidated more than six years before the action was brought, the plaintiff traversed this plea. It was held that the burden of proof was upon the defendant to show that the accounts were liquidated and closed.[4]

If a party seeks to recover of another upon a contract made by another in his name as agent, the burden is upon him to establish the agency. Thus where a person sold goods to another whom he alleged to be the agent of a quartermaster, and the allegation was traversed, it was held that the burden was upon the plaintiff not only to establish the agency, but also the appointment of the quartermaster.[5] The fact of agency may be established by proof that a certain person acted as such for the defendant with the defendant's knowledge, or under such circumstances that he may be presumed to have known of it.[6] But where the defense to an action is that the contract was made by the defendant as agent, the burden is upon him not only to establish that fact, but also that he was, in fact, agent for the person against

[1] Bainbridge *v.* Wilcocks, Bald. (U. S. C. C.) 536 ; White *v.* Mason, 3 Cranch (U. S. C. C.), 250 ; Hopkirk *v.* Page, 2 Brook. (U. S. C. C.) 20 ; Barry *v.* Barry, 3 Cranch (U. S. C. C.), 120 ; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129.

[2] Webbe *v.* Chambers, 3 Ired. (N. C.) L. 374 ; Sheppard *v.* Bank of Missouri, 15 Mo. 143 ; Freeland *v.* Heron, 7 Cranch, 147.

[3] Mills *v.* Johnston, 23 Tex. 308.

[4] M'Lellan *v.* Crofton, 6 Me. 308.

[5] Calkins *v.* United States, 1 Ct. of Cl. 382. See also Beals *v.* Merriam, 11 Met. (Mass.) 470.

[6] State *v.* Foster, 23 N. H. 348.

whom he claims the liability exists, and that he had full authority to make the contract for him.[1]

Where an original entry of an account was altered, it was held that the alteration must be explained or it would be presumed to be in accordance with the facts at the time of entry ;[2] but if the alteration is not apparent, the person claiming the benefit of it must prove it fully ;[3] so where a mortgage was altered, it was held in the absence of proof to the contrary that the burden was on the mortgagee to explain the alteration, and that in the absence of proof to show that the alteration was in accordance with the contract, it would be presumed that the contract was as it existed before the alteration was made ;[4] and as to whether a material alteration requiring explanation has really been made since the delivery of the contract, the court may determine.[5] Where an official document, which has always remained in the custody of the officer entitled to its charge, is altered, it will be presumed, until the contrary appears, that the alteration was rightly made.[6] Where, previous to the inspection by the jury of a locality where a crime has been committed, a change has been made, it is incumbent upon the prosecution to show that the change does not injuriously affect the respondent.[7] When a party who has formerly resided for a long time in one locality goes to reside in another for such a time as raises a reasonable presumption of actual residence, the burden is upon him to show that his domicile is still at the place in which he has formerly resided.[8]

Where a lien has once attached in favor of a vendor, it is incumbent upon a purchaser who claims that the lien has been quieted or lost to maintain the fact.[9] When a person

[1] Oawter *v.* Baker, 23 Ind. 63 ; Wheeler *v.* Reed, 36 Ill. 81.

[2] Shiels *v.* West, 17 Cal. 324.

[3] Davis *v.* Jenny, 1 Met. (Mass.) 221.

[4] Van Horn *v.* Bell, 11 Iowa, 465.

[5] Wood *v.* Steel, 6 Wall. (U. S.) 80 ; Ives *v.* Farmers' Bank, 2 Allen (Mass.), 236.

[6] Devoy *v.* New York, 35 Barb. (N. Y.) 264.

[7] State *v.* Knapp, 45 N. H. 148.

[8] Atler *v.* Waddell, 20 La. Ann. 246. See Hart *v.* Horn, 4 Kan. 232, where it is held that *fact* and *intent* must concur to work a change of domicile. See also Clarke *v.* Territory, 1 Wash. Ter. 82.

[9] Hays *v.* Horine, 12 Iowa, 61.

seeks to recover of a carrier for injuries received by his or its neglect, the law presumes that he was a passenger for hire, and the burden of establishing the contrary is on the carrier;[1] so in an action against a carrier of goods it is not incumbent on the plaintiff to show negligence on the part of the carrier, but the burden is on the carrier to show that the goods were not delivered by reason of the intervention of a legal excuse.[2] The rule is that it is only incumbent upon the plaintiff to show a delivery of the goods to the carrier and their loss, or if the claim is for damages done to them, the fact that they are damaged and the amount of the injury, and the *onus* is then imposed upon the carrier of showing that the loss or damage resulted from some of the perils from which they are exempted under their contract of shipment;[3] but in actions against common carriers of passengers, the mere fact that a passenger was injured while on his journey is not sufficient to throw the *onus* of proving due care on the carrier. The burden is on the party injured to make out that degree of negligence and want of care on the part of the carrier essential to charge him with liability, and he cannot rest his case until such proof is made; as, failing in that, the carrier is entitled to a verdict without the introduction of any proof whatever.[4]

Sec. 198. Fraud.

In all cases where fraud is charged as substantive matter, whether in a declaration or plea, the party alleging it must make it out by a clear preponderance of evidence.[5] Thus where fraud is charged in the administration of a trust, the party relying upon it takes the burden of establishing the fraud, and the evidence must be such as to overcome the

[1] Buffit *v.* Troy, etc., R. R. Co., 36 Barb. (N. Y.) 420.

[2] Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

[3] Shaw *v.* Gardner, 12 Gray (Mass.), 488; Steamer Niagara *v.* Cordes, 21 How. (U. S.) 70; Ill. R. R. Co. *v.* Cowles, 32 Ill. 116; Humphreys *v.* Switzer, 11 La. Ann. 320; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

[4] Mitchell *v.* Western, etc., Railroad Co., 30 Ga. 22.

[5] Beatty *v.* Fischel, 100 Mass. 448; Kline *v.* Horine, 47 Ill. 430; Hager *v.* Thomson, 1 Black (U. S.), 80; Oaks *v.* Harrison, 24 Iowa, 179; Winslow *v.* Gilbert, 50 Me. 90; Blaisdell *v.* Cowell, 15 Me. 370.

presumption of a correct administration of the trust which the law raises in favor of the trustee ;[1] so, too, where fraud is charged in a contract, all the elements necessary to establish the fraud must be made out by the party alleging it ;[2] as where false representations in the sale of property are relied on, it must not only be proved that the representations were false, but that they were made with a *fraudulent* intent and in respect to a material matter ;[3] mere expressions of opinion by the vendor of property, real or personal, whether relating to its quality or quantity, even though such representations are erroneous and untrue, are not sufficient in the absence of improper motive to establish fraud either in support of an action at law or for relief in equity. The representations, in order to be actionable or relievable in equity, must have been in reference to a substantive matter, must have been relied on by the purchaser and made under such circumstances as to show a fraudulent purpose on the part of the vendor, and the burden of establishing all these facts is upon him who would avail himself of them ;[4] as that the facts claimed to be false were peculiarly within the vendor's knowledge ;[5] or that he made the representations as matter of *knowledge* and not of belief, the fraud consisting in setting up his mere belief as knowledge ;[6] so in an action where the material question is, whether a party selling property with certain defects under such circumstances that fraud is predicted of the act, it is incumbent on the party alleging the fraud to prove that the other *did not* disclose the defects ;[7] and indeed in all cases where the presumptions are with the defendant, the burden is on the plaintiff to fully

[1] Bibb *v.* Pope, 43 Ala. 190.

[2] Smith *v.* Webb, 64 N. C. 541.

[3] Taylor *v.* Scoville, 54 Barb. (N. Y.) 34.

[4] Moore *v.* Barre, 11 Iowa, 198; Drake *v.* Latham, 50 Ill. 270; Curry *v.* Keyser, 30 Ind. 214; Putney *v.* Handy, 99 Mass. 5; Wheeler *v.* Randall, 48 Ill. 182; Marshall *v.* Gray, 39 How. Pr. (N. Y.) 172; Hagee *v.* Grossman, 31 Ind. 223.

[5] Sinerking *v.* Litzler, 31 Ind. 13; Paddock *v.* Fletcher, 42 Vt. 389; Morgan *v.* Skidmore, 55 Barb. (N. Y.) 263; Bradbury *v.* Bordin, 35 Conn. 577; Fackler *v.* Ford, McMahon (Kan.), 21.

[6] Cabot *v.* Christie, 42 Vt. 121; Paddock *v.* Fletcher, id. 389.

[7] Flemming *v.* Slocum, 18 Johns. (N. Y.) 403.

overcome them. Thus, in all cases where fraud is alleged and relied on, the *onus* is on the plaintiff to prove it fully and by strict proof, even though it involves negative proof, because fraud is never presumed, but rather the opposite ;[1] so where an action is brought for official misconduct or neglect, the presumption being that all officers discharge their duty, it is incumbent on the plaintiff to overcome this presumption by full proof and to take the burden of proof, whether the issue is affirmative or negative ; as where a sheriff is charged with neglect in the service of process[2] or in the levy of an execution, it is always incumbent on the plaintiff to establish the neglect by showing that the officer did not discharge his duty ;[3] and so in a multitude of instances too numerous for special mention here, and, indeed, in all instances where the right of action or the validity of the defense depends upon proving that a certain act was *not* done, the party alleging it, whether plaintiff or defendant, takes the *onus* of proof. As illustrative of this, where a levy of an execution is sought to be avoided upon the ground that the sheriff has failed to give the notice required by law, the law raising a presumption in favor of the sheriff that he has performed his duty in a legal manner, the burden is upon the party attacking the levy, not only to overcome this presumption by strict proof, but to overcome by a fair preponderance of evidence all proof interposed tending to establish the presumption and to show that the notice was not given ;[4] so in settlement cases where a pauper is sought to be charged upon another town or county, it is always incumbent upon the town or county seeking to charge the other with the pauper's support to show that the pauper has no settlement in it ;[5] so in actions for malicious prosecutions, want of probable cause must be fully made out by the plaintiff';[6] so

[1] Norris' Peake on Ev., p. 7.

[2] Buler *v.* Bullitt, 3 Marsh. (Ky.) 280.

[3] Davis *v.* Johnson, 3 Munf. (Va.) 81.

[4] Hartwell *v.* Root, 19 Johns. (N. Y.) 345 ; Topper *v.* Taylor, 6 S. & R. (Penn.) 173.

[5] Wilmington *v.* Burlington, 4 Pick. (Mass.) 174.

[6] Lane *v.* Crombie, 12 Pick. (Mass.) 177 ; Purcell *v.* McNamara, 9 East, 361.

in criminal proceedings, while the burden is upon the State of establishing not only affirmative, but also negative matter, such as the absence of provocation, or that the act was not done in self-defense, in trials for murder; yet, as to all matters not connected with the body of the offense charged, and which are in defense purely, the burden is on the respondent. In a Vermont case,[1] the court very ably discussed the rule applicable to trials for murder as to the burden of proof in cases where there were any really exculpatory circumstances, and held that in all such cases the burden is upon the State to make out all the elements necessary to establish the principal offense, even to the extent of overcoming the force of such exculpatory circumstances.[2]

The presumption of innocence must be fully overcome by the prosecution in all criminal cases.[3]

Sec. 199. Exceptions to Rule.

The party holding the affirmative of the issue, as a *general* rule, takes the *onus* of proof, but there are numerous exceptions to this rule, and it may be stated as a general proposition *that in all instances where the right of action depends upon a negative averment, the party making it is charged with the burden of proving it.* This is in obedience to the rule that the burden of proof is upon him who raises an issue which would be defeated if no proof was offered.[4] The rule operates no hardship, for the reason that a party whose right of action depends upon proof that a person has not done an act which he was legally bound to do, and the neglect to do which creates a legal liability in his favor, is presumed to be prepared with proof that the act has not been done, and without such proof the bringing of an action is wholly unwarranted. There are a multitude of instances, however, where only slight proof of the affirmative of the issue is necessary to throw the burden of proving the negative upon the defendant. These are instances where the law presumes the affirmative of the issue. Thus, in an action on a promissory

[1] State *v.* Patterson, 45 Vt. 308.
[2] State *v.* Lipscomb, 52 Mo. 32; State *v.* Murphy, 33 Iowa, 270.
[3] United States *v.* Gooding, 12 Wheat. (U. S.) 460.
[4] Kent *v.* White, 27 Ind. 390.

note, the mere production of the note, where its execution is not denied, is sufficient to establish the plaintiff's right of action, the law presuming non-payment from the fact of possession; and if the defendant sets up payment, the burden is upon him, and this is the case in all actions upon written evidence of indebtedness where the amount is liquidated. But in actions upon book debt, the rule is different. In such cases, unless a settlement has been had, and the amount due liquidated under the hands of the parties, the plaintiff is not only compelled to prove his account, but, also, that it has not been paid; so in an action upon a bond, the mere production of the bond is not sufficient; the plaintiff is also bound to prove that the defendant has not complied with its provisions, and if there are any precedent acts to be performed by him, that he has on his part fully performed, before the burden is shifted to the defendant. There are exceptions to the general rule that he who takes the affirmative of an issue takes the burden of proof, as where the declaration or plea sets up negative matter, essential to the issue, which is peculiarly within the knowledge of the other party. In such cases the allegations are taken as true unless denied by the other party.[1] Thus, in actions for a penalty for selling articles without a license, the fact that the party has a license being peculiarly within the knowledge of the defendant and susceptible of easy proof by him, the burden is upon him to show that he has complied with the law, and has a license to sell.[2] Indeed, it may be given as the general rule that *in all cases where the nature of the allegations is such as to show that the defendant is peculiarly possessed of the knowledge to disprove the issue, the law presumes the truth of the negative allegations, and the burden is upon the defendant to disprove them. But the rule never attaches except in instances where the law presumes the truth of the allegation until the contrary is shown.*[3]

[1] State *v.* Crowell, 15 Me. 171; Haskill *v.* Com., 3 B. Monr. (Ky.) 342; Schleisinger *v.* Hexter, 34 N. Y. Superior Ct. 499; Ryan *v.* Valandingham, 25 Ill. 128.

[2] Wheat *v* State, 6 Mo. 455.

[3] Genig *v.* State, 1 McCord (S. C.), 573; Com. *v.* Kimball, 7 Met. (Mass.) 304; Sheldon *v.* Clark, 1 Johns. (N.Y.) 513; Smith *v.* Jeffries, 9 Price, 257.

In an indictment for keeping a ferry without a license, it was held that the burden is upon the defendant to show that he had a license, and that the prosecution were not obliged to introduce any evidence upon that point ;[1] but in cases where the knowledge is equally accessible to both parties, so that it cannot be said to be peculiarly in the defendant, the rule is otherwise. Thus, it has been held that where licenses granted were a matter of record in a public office, and must be there recorded in order to have validity, the State is bound to show that no license was granted to the defendant. Where a person makes a will while under guardianship as *non compos mentis*, the burden is upon the executor to show both that the testator had such mental capacity and freedom of will and action as are requisite to make a legal and valid will ;[2] but where the insanity of the testator is set up in avoidance of the will, the party alleging it must prove it, as the law presumes the opposite.[3]

In an action for a breach of covenant in not supplying timber according to the terms of the contract, where the defense was that the plaintiff did not furnish money, it was held that the *onus probandi* was upon the defendant, but that a verdict ought not to be rendered against the defendant if the proof was such that the jury had reasonable doubts as to the facts ;[4] so in an action by an assignee under insolvent or bankrupt laws, to recover the value of property transferred by the bankrupt to one of his creditors, it is incumbent on the plaintiff to prove that the defendant had reasonable grounds to believe that the bankrupt was insolvent when the transfer was made.[5] Merely alleging a fact, without producing any evidence to support it, can in no case throw the burden upon another party of disproving it ;[6] as an allegation that a note sued upon is without consideration.[7]

[1] Wheat *v.* State, 6 Mo. 455.

[2] Breed *v.* Pratt, 18 Pick. (Mass.) 115.

[3] Barton *v.* Scott, 3 Rand. (Va.) 399 ; Phelps *v.* Hartwell, 1 Mass. 71 ; Hubbard *v.* Hubbard, 6 Mass. 397.

[4] Hollister *v.* Bender, 1 Hill (N. Y.), 150.

[5] Butler *v.* Breck, 7 Met. (Mass.) 164.

[6] Kyler *v.* Calmes, 1 How. (Miss.) 121.

[7] Kyler *v.* Calmes, *ante.*

The date of the assignment of a note is *prima facie* evidence of the time when it was assigned.[1] Where a party has once acquired a domicile in a town, and is there taxed, in a suit for the same, the burden is upon him to show that he had really abandoned his domicile there, before the tax is assessed;[2] so in an action between two towns for the support of a married woman who is a pauper, the burden is on the plaintiff town to show that she has a settlement in the defendant town, and if the defendant town seeks to avoid liability upon the ground that her husband had a settlement in some other town, the burden of proving this is on the defendant, the rule being that a person seeking to avoid liability by setting up new matter takes the burden of proof as to such matter;[3] so where, in an action between two towns for the settlement of a pauper, the defendant admits that the pauper once had a residence in it, but claims that he has since gained a residence in the plaintiff town, the burden is on the defendant to establish the issue;[4] so in a case where the seizin of the party at a given time is admitted or proved, the legal presumption is that it continues, and one who sets up a disseizin takes the burden of proof of overcoming the presumption and establishing a disseizin by *full* proof.[5]

Where, in an action of ejectment, the plaintiff claims to recover by reason of the breach of a condition subsequent, he is bound to prove the breach, even though a negative.[6] Where either party claims under a document signed by a public agent, the signature must be proved, whether denied or not.[7] So, in a *qui tam* action against a clerk for issuing a license to marry a female under age, the plaintiff is not bound to prove that consent was not given; the record of the fact being *prima facie* evidence of it, and in the custody of the clerk, he is bound to produce it if he justifies under it;[8]

[1] Byrd *v.* Tucker, 3 Pike (Ark.), 451.

[2] Kilburn *v.* Bennett, 3 Met. (Mass.) 199.

[3] Randolph *v.* Easton, 23 Pick. (Mass.) 242.

[4] Kilburn *v.* Bennett, 3 Met. (Mass.) 199.

[5] Brown *v.* King, 5 Met. (Mass.) 173.

[6] O'Brien *v.* Doe, 6 Ala. 787.

[7] Yo-nee-gus-kee *v.* Coleman, 3 Hawks (N. C.), 174.

[8] Blaun *v.* Beal, 5 Ala. 357.

so in a *qui tam* action against a minister for marrying a minor the burden of proving the parents' consent is on him.[1] In a trial for a criminal offense, the prosecution is bound to prove actual guilt even to the extent of negativing facts that would exclude it. Thus in a New York case[2] it was held that proof by the State that a murder had been committed, and that the house in which the body was found was set on fire, under circumstances that warranted a suspicion that it was fired by the perpetrator, was not enough to show that the respondent *might* have been at the scene of the fire to change the *onus* of proof upon the respondent to account for his presence, but that it must show that he was *in fact* there.

Sec. 200. Presumption of Innocence, Etc.

The law presumes every person to be innocent until they are proved to be guilty of a crime, and this presumption is so strong that the prosecution must, before it rests its case, make out the person's guilt by such evidence as leaves no reasonable doubt, or he will be entitled to an acquittal without the introduction of any rebutting proof;[3] and where the evidence is circumstantial, the rule is that the jury, in order to convict the prisoner, must find the circumstances clearly proved *as facts*, and when they are so found, they must be of such force and character as clearly and unequivocally imply the prisoner's guilt, and not consistent with any reasonable hypothesis of his innocence. If they can be reasonably reconciled with any hypothesis of his innocence, he is entitled to the benefit of that hypothesis, and it would be error for a jury to convict.[4] Indeed, so strong is this presumption of innocence and honesty of purpose on the part of every member of society, it is held that in a civil action where the facts of a case present a double aspect, one consistent with fair dealing and the other involving dishonesty of purpose, the courts will, unless the weight of evidence is decidedly in

[1] Medlock *v.* Brown, 4 Mo. 379.

[2] People *v.* Bodine, 1 Denio (N. Y.), 281.

[3] United States *v.* Gooding, 12 Wheat. (U. S.) 460.

[4] United States *v.* Douglass, 2 Blatchf. (U. S.) 207; Ogletree *v.* State, 28 Ala. 693; State *v.* Newman, 7 id. 69; Com. *v.* Kimball, 24 Pick. (Mass.) 366; Com. *v.* Dana, 2 Met. (Mass.) 329.

favor of the hypothesis of dishonesty, strike the balance in favor of innocence and honesty of purpose.[1] The rule does not go to the extent of excluding *any* doubt as to the prisoner's guilt, but is confined to *reasonable* doubts — such doubts as lead a juror to hesitate about convicting the prisoner, as do not leave the mind satisfied that a verdict of guilty should be rendered, and such as would lead a reasonable man to hesitate about acting against it in the ordinary relations of life. It is not a question whether the jury *must believe* in his guilt, but whether, while the mind inclines to the prisoner's guilt, there is yet such a doubt remaining in his mind as leads him to hesitate about convicting him; whether there is any reasonable hypothesis in view of all the evidence consistent with the prisoner's innocence. If so, the prisoner is entitled to the benefit of the doubt, as the prosecution has failed to maintain the issue raised by it by full proof, which requires it to show the prisoner's connection with the crime beyond a reasonable doubt.

Sec. 201. Burden in Case of Lost Notes, Etc.

As to the burden of proof in the case of lost notes or evidences of indebtedness, the rule is, that where the instrument is admitted once to have existed, the creditor is merely bound to prove its loss, and the burden is upon the defendant to prove payment or satisfaction of the claim.[2]

But the loss must be clearly proved, otherwise all the presumptions as to its contents will be against the holder.[3]

In the case of an instrument mutilated or destroyed by a person who is a party to it, everything which can be, will be presumed against him when it is offered in evidence, and the burden will be upon him to explain the mutilation or de-

[1] Greenwood *v.* Lowe, 7 La. Ann. 197.

[2] Bell *v.* Young, 1 Grant (Penn.), 175; so in McIlroy *v.* Cochran, 3 Litt. (Ky.) 454, it was held that where the loss of a note is alleged and it is admitted by the defendant that such a note once existed, a legal consideration is presumed, and the holder will not be compelled to substantiate the original transaction or show its non-payment.

[3] Little *v.* Marsh, 2 Ired. (N. C.) 331.

struction, and the exact legal character and effect of the instrument originally.[1]

Sec. 202. Who is to Begin.

It frequently becomes an important question whether, under the pleadings, the plaintiff or the defendant shall open the facts and evidence to the jury. The right to begin often confers a great advantage upon a party, and is a right which is generally claimed, as where evidence is anticipated on the opposite side which will give a right to reply generally on the whole case; or in some instances it may be a disadvantage, as where the party relies upon the witnesses of his opponent, or upon the difficulty of the proofs incumbent upon him.

As a rule, the right to begin depends upon the nature of the issue and the rules relating to the burden of proof at the opening of the trial, but the real test is not on which side the affirmative rests, but *which side will be entitled to a verdict if no evidence is given*,[2] which is really nothing more than a new way of stating the rule that the party upon whom the burden of proof lies must begin, because until this question is settled it cannot be determined who would be entitled to the verdict if no proof was given. In determining this question, however, regard is to be had to the effect and substance of the issue, rather than to its grammatical form.[3] Thus, in an action for the breach of a contract by executing it in an unworkmanlike manner, and the defendant pleads that it was executed in a workmanlike manner, the plaintiff must begin, because if no evidence was given the verdict must be against him, because the law will not assume that the work was bad.[4] So is an action by an indorser against an acceptor; if the defendant pleads that the bill was for the drawer's accommodation, and that the plaintiff did not give any consideration to the drawer, to

[1] Kent *v.* Bottoms, 3 Jones (N. C.), 78; Haleyburton *v.* Kershaw, 3 Des. (S. C.) 105; Henderson *v.* Hake, 1 D. & B. (N. C.) 119.

[2] Leete *v.* Gresham Ins. Co., 15 Jur. 1161.

[3] Amos *v.* Hughes, 1 M. & R. 464; Lamand *v.* Leggett, 7 C. & P. 615.

[4] Amos *v.* Hughes, *ante*.

which the plaintiff replies that it was indorsed to him by the drawer for a good consideration. As a consideration is presumed, the defendant must begin by proving the want of it, or some suspicious circumstances to throw the proof on the plaintiff.[1] In a declaration upon a policy of life insurance, the plaintiff averred that the deceased had led a temperate life, which was denied by the plea. It was held that the *onus probandi*, and therefore the right to begin, was with the plaintiff, as he was bound to give some evidence that the life was insurable: though it was contended that intemperance was not to be presumed.[2] And the same rule has been adopted where the issue was raised on a plea respecting the health of the insured;[3] although in the last case the plea, alleging a specific complaint, ended with a verification. Where an issue on the sanity of a person was directed by chancery, the court presumed that the person ordered to be plaintiff was to begin.[4]

So, generally if the affirmative of the issue lies on the defendant, and the plaintiff does not seek to recover *unascertained* damages, the defendant's counsel begins (after the pleadings have been opened by the plaintiff), and has the general reply.[5] Thus, where the defendant, a constable, being sued in trespass pleaded a justification without the general issue, it was held that his counsel, admitting a demand of a copy and perusal of the warrant and the damages claimed, was entitled to begin.[6] To trespass *quare clausum* the defendant pleaded a right to a watercourse and entry to remove obstructions, the plaintiff traversed the right. It was held that the judge might properly allow the defendant to begin, *unless the plaintiff undertook to prove substantial damage*.[7] So where a defendant in replevin pleads property

[1] Mills *v.* Barber, 1 M. & W. 425; Lewis *v.* Parker, 4 Ad. & E. 838.

[2] Huckman *v.* Fernie, 3 M. & W. 505; Rawlins *v.* Desborough, 2 M. & R. 70.

[3] Geech *v.* Ingall, 14 M. & W. 95; Ashby *v.* Bates, 15 M. & W. 589.

[4] Frank *v.* Frank, 2 M. & R. 314.

[5] Cotton *v.* James, M. & M. 275; Jackson *v.* Hesketh, 2 Stark. 518; Pearson *v.* Coles, 1 M. & R. 206.

[6] Burrell *v.* Nicholson, 1 M. & R. 305.

[7] Chapman *v.* Rawson, 8 Q. B. 673.

in a third person and not in the plaintiff, to which the plaintiff replies that the property is not in such third person, but in himself, the defendant is entitled to begin.[1] And where, to an action of covenant for repayment of money, the defendant pleaded that the deed was given to secure money lost by gambling, it was held that the defendant was entitled to begin.[2]

But where by order of court the defendant is under an obligation to admit the plaintiff's case, this does not necessarily deprive the plaintiff of his right to begin.[3] Nor does the admission by the defendant's counsel of all the facts, the proof of which are on the plaintiff, give the defendant the right to begin, *where the admission of these facts might have been made in pleading*.[4]

In many cases where damages, and not the decision of a mere right, have been the object of an action, defendants so used to plead as to take an affirmative issue on themselves, and thereby attempt to exclude the plaintiff's right to a general reply. The judges, however, came to a resolution that "in actions for libel, slander and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant." The resolution, however, is not to be taken as confined to those actions, or introducing a new practice, but as a declaratory of a principle applicable to other actions.[5] The general rule, therefore, as laid down in this case is, that *wherever the record shows that something, even damages only, is to be proved by the plaintiff, he ought to begin, whether the action be in contract or tort*. Where the damages are of *ascertained amount* or *must be nominal*, then the defendant may begin if the pleading will admit of it.[6] Thus, in the case last cited, in covenant for dismissing a clerk, the defendant pleaded misconduct, and plaintiff replied *de injuriâ, etc.* It was held that plaintiff ought to begin. So in an action on a promissory note, to which defendant pleads *inter alia*, payment into court, and issue is

[1] Colstone *v.* Hiscolbs, 1 M. & R. 301.

[2] Hill *v.* Fox, 1 F. & F. 136.

[3] Thwaites *v.* Sainsbury, 5 C. & P. 69.

[4] Pontifex *v.* Jolly, 9 C. & P. 202; Price *v.* Seaward, C. & M. 23.

[5] Mercer *v.* Whall, 5 Q. B. 447, 462

[6] Mercer *v.* Whall, *ante*.

joined as to damages *ultra*, the plaintiff is to begin, though other issues lie on the defendant.[1] On a note by the defendant, to which she pleads coverture when she made it, on which issue is joined, the defendant is to begin, although the plaintiff seeks to recover interest not mentioned on the note.[2] In trespass, where the defendant pleaded a custom to divert water, which was traversed by the plaintiff, the defendant was allowed to begin, though the plaintiff's counsel asserted his intention to ask for heavy damages.[3] In the case last cited TINDAL, C. J., said: "The plaintiff might have traversed the custom and new assigned excess, and then would have had a right to begin."

The plaintiff need not in any action prove the amount of damage he alleges he has sustained, unless the defendant either deny or state that he does not admit the same. Hence, where the defense contains no such denial or statement, and is affirmative only, the defendant will be entitled to begin.[4] Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he has a right to begin as to all;[5] and it seems that judgment by default as to part has the same effect, though the defendant pleads affirmatively as to the residue.[6] But where, to an action on a bill and on an account stated, the defendant pleaded payment to the first and non-assumpsit to the second count, it was held that the plaintiff had no right to begin unless his counsel undertook to give some evidence of the account stated besides the bill.[7] The plaintiff in replevin has the same right as in other actions, though both parties are actors.[8]

[1] Booth *v.* Millns, 15 M. & W. 669.

[2] Cannam *v.* Farmer, 3 Exch. 698.

[3] Bastard *v.* Smith, 2 M. & R. 129.

[4] Lacon *v.* Higgins, 3 Stark. 178; Morris *v.* Lotan, 1 M. & R. 233; Bonfield *v.* Smith, 2 M. & R. 519; 3 C. & P. 463; Woodgate *v.* Potts, 2 C. & K. 258; Tindall *v.* Basket, 2 F. & F. 644, and 1 Taylor Evid., § 355.

[5] Rawlins *v.* Desborough, 2 M. & R. 328; Collier *v.* Clark, 5 Q. B. 467.

[6] Wood *v.* Pringle, 1 M. & R. 277.

[7] Smart *v.* Raynor, 6 C. & P. 721; Mills v. Oddy, 6 id. 728; overruling Homan *v.* Thompson, 6 id. 717; Frith *v.* McIntyre, 7 C. & P. 44; Oakeley *v.* Ooddeen, 2 F. & F. 656.

[8] Curtis *v.* Wheeler, M. & M. 493.

Sec. 203. Who is to Begin an Action for Recovery of Land.

In ejectment the defendant may, in some cases, by admitting a title in the plaintiff, entitle himself to begin, and the same principles apply to an action for the recovery of land by a remedy substituted for ejectment, notwithstanding the use of pleadings therein. Thus, where the plaintiff claims as heir-at-law, and the defendant as devisee, it is a settled rule that the defendant, by admitting the plaintiff's pedigree and the dying seised, may entitle himself to begin and to reply.[1] And the same principle applies, although one of the plaintiffs had, since the death of the testator, become assignee of an outstanding term in part of the land; for "the real question in dispute is the validity of the will."[2] For the same reason, where the plaintiff claimed as heir of C. and as devisee and heir of R., who was C.'s heir, and the defendant claimed as devisee of C., the defendant's counsel was permitted to begin on admitting that plaintiff was heir of C. and of R., and entitled to recover, *unless* defendant proved C.'s will.[3] Where the plaintiff claims as devisee of A., and the defendant as devisee under a subsequent will of A., the defendant cannot, by admitting the seisin of A. and the *prima facie* title of the plaintiff, entitle himself to begin.[4] Generally, in order to entitle the defendant to begin by admitting the plaintiff's case, he must admit the *whole* without qualification.[5] Therefore, where the plaintiff claims as the heir of A., and defendant under a conveyance by A. in his lifetime, the latter cannot deprive the plaintiff of the right to begin by only admitting the heirship of the plaintiff and seisin of A. *unless* defeated by the conveyance,[6] for it is part of the plaintiff's case that A. died seized. So where each party claimed as heir, and defendant admitted that plaintiff was entitled as heir *if* defendant was not legitimate; held, that he could not by so doing obtain a right to begin.[7]

[1] Revett *v.* Braham, 4 T. R. 497; Fenn *v.* Johnson; Adam's Eject. (2d ed.) 256, and Mercer *v.* Whall, 5 Q. B. 464.

[2] Smith *v.* Smart, 1 M. & R. 476.

[3] Wollaston *v.* Barnes, 1 M. & R. 386.

[4] Wollaston *v.* Barnes, overruling Corbett *v.* Corbett, 3 Camp. 368.

[5] Pill *v.* Wilson, 1 M. & R. 232.

[6] Tucker *v.* Tucker, M. & M. 536.

[7] Warren *v.* Bray, M. & M. 166.

An erroneous ruling of the court as to who is to begin, will not necessarily entitle the party to a new trial,[1] but if the error is clear and an undue advantage may have been given to the successful party, it is ground for a new trial.[2]

Sec. 204. Right to Reply.

Generally, the party who begins has the right to the general reply if the other party calls witnesses. If the defendant introduces evidence to impeach the plaintiff's case, and also sets up an entirely new case which the plaintiff controverts by evidence, the defendant in his reply is confined to the new case set up by him.[3] Unless the defendant gives new evidence the plaintiff is not entitled to reply, there being no facts upon which his counsel can comment.

[1] Bradford *v.* Freeman, 5 Exch. 274.

[2] Ashley *v.* Bates, 13 M. & W. 589; Bather *v.* Brayne, 5 C. B. 655.

[3] Starkie's ed. 384.

CHAPTER XVIII.

PRIMA FACIE EVIDENCE.

SECTION.

205. General Rule as to. Illustrations.
206. As to Receipts, etc.

Sec. 205. General Rule as to. Illustrations.

While it is true that a person seeking a recovery of another in an action at law is charged with the burden of proving the issue in his favor, yet whenever the law interposes any presumptions in his favor, it often happens that he is only called upon to make *prima facie* proof. Therefore it is material to know what, in law, is regarded as *prima facie* evidence, so that its production by a party puts the other party in a position that he must rebut it, to prevent a recovery against him. *Prima facie* may be said to be such evidence as in law is regarded as sufficient to entitle a party to a recovery until it is fairly overcome by rebutting proof.[1] Thus, in an action upon a promissory note, unless a plea or notice denying its execution by the defendant is filed, the plaintiff is only required, in the first instance, to produce the note on trial, and the law presuming from its possession by him that it is still an outstanding obligation upon the makers and indorsers, its production makes, for the plaintiff, a *prima facie* case, and the burden is imposed upon the defendant to overcome the effect of this *prima facie* case, or the plaintiff will be entitled to a judgment for the amount apparently due upon it.[2]

So, in an action of trover, possession of a chattel is *prima facie* evidence of title, and imposes upon the plaintiff the *onus* of proving title in the chattel in himself, or that he has a right to its possession as against the defendant, and he must do this by such proof as fully overcomes the presumption of property in him who has possession.[3]

[1] Kelly *v.* Jackson, 6 Pet. (U. S.) 622.

[2] Conway *v.* Williams, 2 Hun (N. Y.), 642.

[3] Pinkham *v.* Gear, 3 N. H. 484; Finch *v.* Alston, 2 S. & P. (Ala.) 83; Drummond *v.* Hopper, 4 Harr. (Del.) 327; Trougott *v.* Byers, 5

This presumption of title to personal property in him who has possession is so strong that it is held that all species of personal property found among the effects of a deceased person belong to his heirs, and that if any person claims to be the owner thereof he must make out his title by clear and unmistakable proof of ownership in him, and beyond a doubt ;[1] but possession of personal property by the consent of the true owner does not raise a legal presumption of title against the owner, but only against others ;[2] and where property is found in the possession of several, the law refers the possession to him who has the true title, and this is the rule both as to real and personal estate ;[3] so prior possession of land is *prima facie* evidence of a title in fee, and is good until a better title is proved ;[4] but such title may be overcome by one who has a better title thereto, and when a better title is established, the possession of the premises, if short of the statutory period, will be presumed to be in subordination to the title of the real owner, as adverse possession is never presumed by the law. But the *onus* of establishing the real title is upon him who sets it up ;[5] but when title is claimed by adverse possession without *color* of title, the *onus*, as against one having a clear documentary title, is on him who sets up the possessory title ;[6] and all presumptions will be against him, and he will be required to make out his possessory title by strict proof ;[7] but as against every person, except one

Cow. (N. Y.) 480 ; Goodwin *v.* Garr, 8 Cal. 615 ; Entreken *v.* Brown, 32 Penn. St. 364 ; Vining *v.* Baker, 53 Me. 44 ; Fish *v.* Skut, 21 Barb. (N. Y.) 333.

[1] Succession of Alexander, 18 La. Ann. 337.

[2] Magee *v.* Scott, 9 Cush (Mass.) 148.

[3] Maples *v.* Maples, Rice (S. C.), 300 ; Lenoir *v* Rainey, 15 Ala. 667 ; Governor *v.* Campbell, 17 id. 566 ; Miller *v.* Fraley, 23 Ark. 735.

[4] Herbert *v.* Herbert, Breese, 278 ; Hawkins *v.* County Commissioners, 2 Allen (Mass.), 251 ; Ward *v.* McIntosh, 12 Ohio St. 231 ; Hunt *v.* Titter, 15 Ind. 318.

[5] Allen *v.* Harper, 59 Me. 371 ; Baldwin *v.* Buffalo, 35 N. Y. 375 ; Rowland *v.* Updike, 28 N. J. 101 ; Brandt *v.* Ogden, 1 Johns. (N. Y.) 156 ; Edmonston *v.* Shelton, 4 Jones (N. C.), 451 ; Austin *v.* Bailey, 37 Vt. 219 ; McCall *v.* Pryor, 17 Ala. 533 ; Russell *v.* Marks, 3 Met. (Ky.) 57 ; Rochell *v.* Holmes, 2 Bay (S. C.), 487.

[6] Rowland *v.* Updike, 28 N. J. 101 ; Stewart *v.* Cheatham, 3 Yerg. (Tenn.) 60 ; Clifton *v.* Lilly, 12 Tex. 130.

[7] Edmonston *v.* Shelton, 4 Jones (N. C.), 451 ; Baldwin *v.* Buffalo, 35 N. Y. 375.

having a clear documentary title, possession is sufficient, and all presumptions will be made in its favor.[1]

It must be understood that a presumption of title from possession never arises except when the possession is perfectly consistent with an unqualified ownership. When it is shown that it was taken in subordination to the title of another, and that only a qualified interest or estate less than an absolute title was claimed, a grant will not be presumed.[2] Where the death of a party becomes a material issue, a grant of letters of administration is *prima facie* sufficient evidence of his death;[3] so proof that he was missing at a particular time, and the circulation of a report and general belief that he was dead, is *prima facie* evidence of his death;[4] or that he has been absent and not heard from for seven years.[5] The record of the discharge of an insolvent or bankrupt debtor is *prima facie* evidence of notice to all his creditors;[6] so an entry in a day-book is *prima facie* evidence of the price and delivery of the goods charged there;[7] so an entry in a log-book is *prima facie* evidence of the truth of every particular of such entry;[8] so an acknowledgment of the payment of the purchase-money in a deed is *prima facie* evidence of the fact;[9] so a receipt is *prima facie* evidence of all it purports to be, and no more;[10] therefore a receipt for so much money for property delivered is not *prima facie* evidence that it is in

[1] Nixon *v.* Carce, 28 Miss. 414; Clifton *v.* Lilly, 12 Tex. 130; Wendell *v.* Blanchard, 2 N. H. 456.

[2] Colvin *v.* Warford, 20 Md. 357.

[3] French *v.* Frazer, 7 J. J. Marsh. (Ky.) 425.

[4] Jackson *v* Etz, 5 Cow. (N. Y.) 314.

[5] Whiteside's Appeal, 23 Penn. St. 114; Bradley *v.* Bradley, 4 Whart. (Penn.) 173; Eagle *v.* Emmett, 4 Bradf. (N. Y.) 117; Osborn *v.* Allen, 26 N. J. 388; Newman *v.* Jenkins, 10 Pick. (Mass.) 515; Stevens *v.* McNamara, 36 Me. 176; Crawford *v.* Elliott, 1 Houst. (Del.) 465; Smith *v.* Knowlton, 11 N. H. 191; Caper *v.* Thurmond, 1 Ga. 538; Tilley *v.* Tilley, 2 Bland (Md.), 436; Primm *v.* Stewart, 7 Tex. 178; Spurr *v.* Taimbull, 1 A. K. Marsh. (Ky.) 278; Winship *v.* Connor, 42 N. H. 341; Stinchfield *v.* Emerson, 52 Me. 465; Hulett *v.* Hulett, 40 Vt. 384.

[6] Jay *v.* Slack, 4 N. J. L. 77.

[7] Ducoign *v.* Schneppl, 1 Yeates (Penn.), 347; McCoul *v.* Lekamp, 2 Wheat. (U. S.) 111.

[8] Douglass *v.* Eyre, Gilpin, 146.

[9] Thallhimer *v.* Brinkerhoff, 6 Cow. (N. Y.) 90; Gully *v.* Grubbs, 1 J. J. Marsh. (Ky.) 387.

[10] McDowell *v.* Lemaitre, 2 N. & M. 320.

full for all such property previously delivered ;[1] so is a bill of lading ;[2] or a certificate of preemption has been held to be *prima facie* evidence of title as against any other certificate or survey.[3] The record of a recovery in an ejectment suit is *prima facie* evidence of title to the premises involved in the action ;[4] a decree in admiralty restoring the libeled property to the claimant is *prima facie* evidence of title thereto ;[5] a judgment on an original attachment in another State is *prima facie* evidence of the debt, even though obtained without notice ;[6] so is a judgment against a party not brought into court ;[7] so is a sentence in a foreign court of admiralty unless it contains enough to rebut such presumption ;[8] so, where an act of the legislature directs that the certificate of a public officer shall be evidence, a paper produced with his name will be *prima facie* evidence unless it is proved not to have been signed by him ;[9] so where books of account or papers contain distinct settlements made at different times, the last settlement is *prima facie* evidence of the fact that it embraces all the others ;[10] so a receipt acknowledging payment of a subsequent quarter's rent is treated as *prima facie* evidence that all the prior rent is paid;[11] the return of an officer upon a warrant is regarded as *prima facie* evidence of an arrest against both the grand juror and officer ;[12] so the date of a writ or other process is *prima facie* evidence of the true time when it was issued ;[13] but the date of a deed or contract is only *prima facie* evidence of the time when it was executed as between the parties thereto.[14] The return of a sheriff is *prima facie* evidence

[1] Reed *v.* Phillips, 6 Ill. 39.

[2] Benjamin *v.* Sinclair, 1 Bailey (S. C.), 174.

[3] Rector *v.* Welch, 1 Mo. 334.

[4] Chirac *v.* Reinecker, 2 Pet. (U. S.) 622.

[5] Thompson *v.* Stewart, 3 Conn. 171.

[6] Miller *v.* Pennington, 2 Stew. 399.

[7] Taylor *v.* Pettibone, 16 Johns. (N. Y.) 66.

[8] Johnson *v.* Ludlow, 1 Caines' Cas. (N. Y.) 30.

[9] Prather *v.* Johnson, 3 H. & J. (Md.) 487.

[10] Dorsey *v.* Kollock, Coxe, 35.

[11] Brewer *v.* Knapp, 1 Pick. (Mass.) 332.

[12] Allen *v.* Gray, 11 Conn. 95.

[13] Society for Prop. of The Gospel *v.* Whitcombe, 2 N. H. 227.

[14] Baker *v.* Blackburn, 5 Ala. 517.

of what was done by him in a controversy between strangers to the suit in which it was made ;[1] so the return of a sheriff on the back of an attachment is *prima facie* evidence of the property, so as to bind it on execution for the payment of the debt ;[2] so an execution book kept by the clerk is *prima facie* evidence of the truth of all entries made in it, but it may be impeached by extrinsic evidence ;[3] an order drawn upon one for money for value received is *prima facie* evidence that the drawer has received the money or its equivalent ;[4] so an order payable out of a specific fund is *prima facie* evidence of debt ;[5] so where an order is given by A. to B. on C. for certain property, B.'s receipt upon the order for the property is *prima facie* evidence in an action by C. against A. of the delivery of the property.[6]

The fact that a testator is under guardianship as a *non compos* at the time of the execution of a will is *prima facie* evidence that the testator had not the requisite mental capacity to make it.[7] The production of a contract or deed bearing the same name with the party in the suit is *prima facie* evidence of identity ;[8] but otherwise if the name is not strictly identical ;[9] and where a party claims an interest in an estate, something more than identity of name is required.[10]

The invoice of a cargo is, against the general principles of evidence, uniformly admitted as *prima facie* evidence of the *value* of the cargo, but of nothing more.[11] The registry of a vessel in a certain name is not even *prima facie* evidence that such person was the owner of the vessel.[12] A register's deed, purporting to be a conveyance of land sold for taxes, is

[1] Gray *v.* Gray, 3 Litt. 465.

[2] Huyer *v.* Osborne, 1 Bay, 319.

[3] Taylor *v.* Dundas, 1 Wash. (U. S.) 92.

[4] Child *v.* Moore, 6 N. H. 33.

[5] Curle *v.* Beers, 3 J. J. Marsh. (Ky.) 170.

[6] Rawson *v.* Adams, 17 Johns. (N. Y.) 130.

[7] Stone *v.* Damon, 12 Mass. 488.

[8] Jackson *v.* King, 5 Cow. (N. Y.) 237 ; Brown *v.* Metz, 33 Ill. 339 ; Cates *v.* Loftus, 3 A. K. Marsh. (Ky.) 202 ; Cooper *v.* Parton, 1 Dur. (Ky.) 92 ; Gitt *v.* Watson, 18 Mo. 274.

[9] Ellsworth *v.* Moore, 5 Iowa, 486 ; Burford *v.* McCue, 53 Penn. St. 427.

[10] Maers *v.* Bunker, 29 N. H. 420.

[11] Graham *v.* Penn. Ins. Co., Wash. C. C. (U. S.) 113.

[12] Sharp *v.* U. S. Ins. Co., 14 Johns. (N. Y.) 201 ; Leonard *v.* Huntington, 15 id. 303.

prima facie evidence that his proceedings were regular. Proof that a person has resided in a place is *prima facie* evidence that such place is still his residence.[2] Proof of the execution and registry of a mortgage deed is *prima facie* evidence of title in the mortgagee without the production of the note which it was given to secure.[3] The return of a constable on a writ is *prima facie* evidence of the facts contained in it, but may be rebutted.[4] The fact that a vessel was seaworthy when a policy attached is *prima facie* evidence that it continued so during the time of the risk.[5] The agreement of adjoining owners upon a dividing line is *prima facie* evidence that it is the true line.[6]

Sec. 206. As to Receipts, Etc.

A receipt for money, and expressed to be in full of all demands, is, however, only *prima facie* evidence of payment, and may be contradicted, varied or explained. They are not subject to the rule which excludes parol evidence to contradict or vary a written instrument.[7] But all presumptions are in favor of the receipt, and the party attacking it must clearly show that its legal effect is not as expressed to be on the face of it; and when the evidence is contradictory, and the evidence on the one side is entitled to as much weight as that on the other, the receipt will stand.[8] Thus, a receipt may be shown to have been fraudulently obtained,[9] to have

[1] Bodly *v.* Hood, 2 A. K. Marsh. (Ky.) 244.

[2] Prother *v.* Palmer, 4 Pike (Ark.), 456.

[3] Davis *v.* Mills, 18 Pick. (Mass.) 394.

[4] Perryman *v.* The State, 8 Mo. 208.

[5] Martin *v.* Fishing Ins. Co., 20 Pick. (Mass.) 389.

[6] Sparhawk *v.* Bullard, 1 Met. (Mass.) 95.

[7] Hill *v.* Robinson, 3 Jones (N. C.), 501; Borden *v.* Hope, 21 La. Ann. 581; Batdorf *v.* Albert, 59 Penn. St. 59; Dolan *v.* Frieberg, 4 W. Va. 101; The Galloway C. Morris, 2 Abb. (U. S.) 164; Middlesex *v.* Thomas, 20 N. J. 39; Pati's Case, 4 Ct. of Claims (U. S.), 523; Joslyn *v.* Capron, 64 Barb. (N. Y.) 599; Driver *v.* Hudspeth, 16 Ala. 348; Brook *v.* Quinn, 13 Md. 379; Rourke *v.* Story, 4 E. D. Smith (N. Y. C. P.), 54; Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head. (Tenn.) 116; Gibson *v.* Hanna, 12 Mo. 162; Smith *v.* Ballou, 1 R. I. 496.

[8] Borden *v.* Hope, *ante;* Levi *v.* Carrick, 13 Iowa, 344.

[9] Clark *v.* Devereaux, 1 S. C. 172; Russell *v.* Church, 65 Penn. St. 9; The Galloway C. Morris, 2 Abb. (U. S.) 164.

been given under a mistake,[1] or in full, when a part only of the debt was received, and that even when no fraud was practiced, no mistake made, and the party giving it was laboring under no error or fraud whatever ;[2] or when it is clearly apparent that it does not embrace the intention of the parties, the real intention may be shown ;[3] or when the meaning is doubtful, the real intention of the parties may be shown ;[4] or when it was obtained under such circumstances that a court of equity would relieve the party against its effect ;[5] but, where there is no fraud, mistake, or evident misconception of rights, and the demand covered by the suit is unliquidated, a receipt is conclusive, and a bar to all actions which it in its terms, or by fair interpretation, covers.[6] Neither are admissions made in a receipt conclusive upon the party giving it. Thus, where a member of a religious society gave a receipt for money paid him, and therein stated that he had "withdrawn himself" from the society, it was held that this did not estop him from maintaining a bill in equity setting up his wrongful exclusion from the society, and demanding an accounting and payment to him of his share of the assets.[7] Shipping receipts, expressed to be in full on account to date, are held to be open to contradiction by parol proof.[8] A receipt may be shown to be without consideration and consequently void.[9] Thus, where A., who had taken from B. a contract to do a certain piece of work, but who, after doing a part of it, had been prevented by B. from completing

[1] Russell *v.* Church, 65 Penn. St. 9 ; Joslyn *v.* Capron, 64 Barb. (N. Y.) 599 ; Dodd *v.* Mason, 39 Ga. 605 ; Walker *v.* Christian, 14 Gratt. (Va.) 291 ; Elwell *v.* Leslie, 6 N. J. Eq. 349.

[2] Ryan *v.* Ward, 48 N. Y. 204 ; Hope *v.* Johnson, 11 Rich. (S. C.) 135 ; Jones *v.* Ricketts, 7 Md. 108.

[3] Grumley *v.* Webb, 44 Mo. 444.

[4] Walker *v.* Christian, 14 Gratt. (Va.) 291 ; Learned *v.* Bellows, 8 Vt. 79.

[5] Fuller *v.* Crittenden, 9 Conn. 401.

[6] Nelson *v.* Blanchfield, 54 Barb. (N. Y.) 630 ; Illinois Central R. R. Co. *v.* Welch, 52 Ill. 183 ; Bonell *v.* Chamberlain, 26 Conn. 487 ; Holbrook *v.* Blodgett, 5 Vt. 520 ; Beers *v.* Broome, 4 Conn. 467 ; Goddard *v.* Cutts, 2 Fairfax (Me.), 440.

[7] Nachtrieb *v.* Harmony Settlement, 3 Wall. Jr. (U. S.) 66.

[8] Dolan *v.* Frieberg, 4 W. Va. 101.

[9] Seymour *v.* Minturn, 17 Johns. (N. Y.) 169 ; Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122 ; Sigourney *v.* Sibley, 21 Pick. (Mass.) 101 ; Stamper *v.* Hayes, 25 Ga. 546.

the balance, upon the receipt from B. of the amount due for the work already done, gave him a receipt "in full satisfaction of the work already done under the contract, which is hereby canceled," it was held that A. was not thereby precluded from recovering of B. the damages sustained by him by reason of the breach of the contract, for the reason that he had only been paid what was due him for work done, and consequently there was no consideration for the release of damages for the breach of the contract ;[1] but, if there is *any* consideration, however slight, the exact value of which cannot be measured, the receipt will be operative, and a bar to all claims which it purports to discharge. Thus, a receipt in which it is stated that the person giving it has received a horse, in full of all demands to date, or any other property, the value of which is not expressed in the receipt, will operate as a discharge of all demands properly embraced within the provisions of the receipt, even though it is apparent that the value of the property received is very much less than the demand or demands discharged. So a receipt may be shown to have been obtained by duress.[2] But a receipt under seal operates as a release of all demands fairly embraced within its terms, and cannot be attacked except upon the ground of fraud ; and parol evidence is not admissible to defeat, alter or vary its effect, at common law, and the question of fraud is for the jury, and not for the court to determine.[3] Such a receipt operates as a release, and being in the nature of an executed contract under seal, if there are any elements of mistake or misconception in it, the remedy is in a court of equity either for a reformation of the contract, or to set it aside. So a receipt given in full for unliquidated claims or damages, as damages for personal injuries received, if free from fraud, is in the nature of a release, and is a bar to any action upon the original claim.[4]

[1] Foersch *v.* Blackwell, 14 Barb. (N. Y.) 607.

[2] Illinois Central R. R. Co. *v.* Welch, 52 Ill. 183.

[3] Eastman *v.* Wright, 6 Pick. (Mass.) 316 ; Loring *v.* Brackett, 3 id. 403 ; Coon *v.* Knapp, 3 N. Y. 375.

[4] Coon *v.* Knapp, 3 N. Y. 375 ; Brown *v.* Cambridge, 3 Allen (Mass.), 474.

The seal of the general land office, and the signature of the commissioner thereof, *prima facie* prove themselves.[1] Recitals of title in an old deed, where possession accompanied the deed, are *prima facie* evidence against any person claiming title under the grantor previous to such deed.[2] The possession of checks, orders or drafts by the corporation or person on whom they are drawn is *prima facie* evidence that they have been paid.[3] A settlement between two parties is *prima facie* evidence of a settlement of all demands, but may be rebutted, and is no bar to a recovery for any matters not embraced therein.[4] An indorsement on a note is *prima facie* evidence of payment of the amount designated.[5] A receipt in full of all demands is *prima facie* evidence of payment of all notes, accounts and claims existing at the time of the receipt.[6] The acceptance, by a municipal corporation, of work which it was authorized to contract for, is *prima facie* evidence that the work is completed.[7] Proof of an entry upon another's premises is *prima facie* sufficient to support an action of trespass, and throws the *onus* upon the defendant of proving that his entry was lawful.[8]

Every person is presumed to know the contents of all papers to which he himself subscribes, or authorizes another to sign his name, whether he can read or write, and the production of an instrument thus signed is *prima facie* evidence of all it contains,[9] and that he knew the legal effect thereof;[10] but such evidence may be rebutted by proof of fraud or of undue advantage.[11]

[1] Harris *v.* Doe, 4 Blackf. (Ind.) 369.

[2] James *v.* Letzler, 8 W. & S. (Penn.) 192.

[3] Union Canal Co. *v.* Lloyd, 4 W. & S. 393.

[4] Nichols *v.* Scott, 12 Vt. 47.

[5] Graves *v.* Moor, 7 Monr. (Ky.) 341.

[6] Marston *v.* Wilcox, 3 Ill. 270.

[7] New Orleans *v.* Halpin, 17 La. Ann. 185.

[8] Belverman *v.* State, 16 Texas, 130.

[9] Harris *v.* Story, 2 E. D. Smith (N. Y. C. P.), 363; Bank *v.* Kimball, 10 Cush. (Mass.) 373; Clem. *v.* N. & L. R. R. Co., 9 Ind. 488.

[10] Mears *v.* Graham, 8 Blackf. (Ind.) 144.

[11] Harris *v.* Story, *ante*.

CHAPTER XIX.

DOCUMENTARY EVIDENCE.

SECTION.

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SECTION.
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248. Effect of Foreign Judgments.
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Sec. 207. Classes of.

Writings may be divided into two classes, private and public. The former are those which are the property and in the custody of individuals or corporations, and the latter are those which are the property and under the control of some department of the government, as legislative journals, records of courts, statutes, proclamations, ordinances, etc., and other writings of a similar character. The mode of proving the contents of these documents when they become material, is of considerable importance to the practitioner, and the object of this chapter is to furnish that information.

Sec. 208. Legislative Journals.

Where it becomes material to establish what was done by a legislative body at a particular session respecting a certain matter, it may be done by producing the journals themselves, where this can be done, or the production of a printed copy thereof published by authority of the State,[1] or by a copy thereof duly certified by the Secretary of State. These journals being the record of the doings of a legislative body, import absolute verity, and cannot be impeached except by the legislature itself.[2] Thus where the journals

[1] Root *v.* King, 7 Cow. (N. Y.) 613. The court should inspect these journals as it would any other record. Coleman *v.* Dobbins, 8 Ind. 156; Albertson *v.* Robinson, 1 Dall. (Penn.) 9. Journals of Congress, printed, have been admitted without other proof of their authenticity. Com. *v.* Dedougchamps, Whart. Dig. 280. But generally proof is required that the printed journals of a legislative body were printed by authority. Root *v.* King, 7 Cow. (N. Y.) 613. But a printed copy of public documents proved to have been transmitted to a legislative body, and printed by the printers to such body, are admissible without other authentication. Radcliffe *v.* United States Ins. Co., 7 Johns. (N. Y.) 50.

[2] McCullough *v.* State, 11 Ind. 424.

show only that an order was reported, it was held that parol evidence was not admissible to show that it was passed by that body.[1] But in Mississippi it is held that such journals do not import absolute verity, and are not conclusive of the facts stated in them.[2] Indeed it is held that they are admissible to overturn even the statute roll;[3] but in this case it was held that where there is a discrepancy between the manuscript and the printed minutes of the proceedings of the legislature, the manuscript will prevail. The journal of a legislative body is admissible to show that a bill which has been certified by the presiding officer of a legislative body as duly passed was not in fact passed, thus overthrowing the *prima facie* and presumptive effect of such certificate,[4] or even when certified by the presiding officers and signed by the governor.[5] Says Mr. Phillips:[6] "These are the documents peculiarly appropriated to the purpose of preserving the memory of such proceedings, which do not appear capable of other authentic or satisfactory proof." These journals have been admitted where limitations upon peerages have been recited therein, without other proof of their authenticity,[7] and generally the journals of either branch of a legislative body are admissible to prove what was done by that body in reference to a particular matter, where it is the duty of the officers thereof to keep a faithful record

[1] Covington *v.* Ludlow, 1 Met. (Ky.) 295.

[2] Green *v.* Weller, 32 Miss. 650.

[3] Chicot County *v.* Davies, 40 Ark. 206. See also State *v.* McClelland (Neb.), 25 N. W. Rep. 77.

[4] State *v.* McClelland, *ante*.

[5] Spangler *v.* Jacoby, 14 Ill. 297; People *v.* Mahoney, 13 Mich. 482; State *v.* Hastings, 24 Minn. 78; Coleman *v.* Dobbins, 8 Ind. 156; Southwark Bank *v.* Com., 26 Penn. St. 446; People *v.* Starne, 35 Ill. 121; People *v.* Purdy, 2 Hill (N. Y.), 31; Berry *v.* Baltimore, &c., R. R. Co., 41 Md. 446. Opinions of Justices, 35 N. H. 579; 52 id. 522; 45 id. 607. People *v.* Supervisors, 8 N. Y. 318; Jones *v.* Hutchinson, 43 Ala. 721. See, however, holding that the validity of an invalid statute duly certified by the presiding officers of a legislative body cannot be impeached by the journals: Pacific R. R Co. *v.* The Governor, 23 Mo. 353. See also Fouke *v.* Fleming, 13 Md. 392; Clare *v.* State, 5 Iowa, 509; Green *v.* Weller, 32 Miss. 651; Evans *v.* Bracom, 30 Ind. 514; People *v.* Devlin, 33 N. Y. 269; Pangborn *v.* Young, 33 N. J. L. 29.

[6] 2 Phillips' Ev. 276.

[7] Lord Duffrein's Case, 4 C. & F. 468.

thereof.[1] Proclamation issued by the President of the United States, or the governor of a State, published by authority, reciting a certain condition is things, is evidence that such condition of things existed,[2] as of the surrender and capitulation of an island,[3] or indeed of any matter which is peculiarly within the knowledge of the government. Thus the date of the declaration of war may be proved by the declaration of the ambassador transmitted by him to the Secretary of State and printed by authority of the government.[4] But the fact that a ratification of a blockade of a certain port has been printed by authority does not raise a presumption that a certain person knew of the blockade, but such knowledge must be proved as a fact.[5] In England, the public acts of the government published in the Gazette, may be proved by the Gazette.[6] But in this country we have no official journals of the government, and public acts published by the government printer by authority occupy the same position as evidence as their publication in the Gazette does in England. Such publications, however, are not evidence of private titles or interests or of any matter which has no reference to government concerns.[7]

Sec. 209. Foreign Statutes.

The statute law of another State or country must be produced, but the common or unwritten law may be proved by parol,[8] otherwise they will be presumed to be the same as those of the former.[9]

[1] R. *v.* Franklin, 17 How. St. Tr. 636.

[2] R. *v.* Holt, 5 T. R. 443; Picton's Case, 30 How. St. Tr. 493; Judd's Case, 8 St. Tr. 212.

[3] Picton's Case, *ante*.

[4] Thelluson *v.* Colling, 4 Esp. 266.

[5] Harratt *v.* Wise, 9 B. & C. 712.

[6] R. *v.* Holt, 5 T. R. 442; Kirwan *v.* Cockburn, 5 Esp. 283; Graham *v.* Hope, Peake, 142; Munn *v.* Baker, 2 Starkie, 255.

[7] R. *v.* Holt, *ante;* Kirman *v.* Cockburn, 2 Esp. 233.

[8] Robinson *v.* Clifford, 2 Wash. (U. S. C. C.) 1; United States *v.* Ortega, 4 id. 53. Foreign laws and regulations, unless shown to be in writing, may be proved by parol, especially those relating to such. Livingston *v.* Marine Ins. Co., 6 Cranch (U.S.), 274; Kenny *v.* Clarkson, 1 Johns. (N. Y.) 385; McRae *v.* Mattson, 13 Pick. (Mass.) 53.

[9] Davis *v.* Rogers, 14 Ind. 424; Hemphill *v.* Bank, 14 Miss. 44.

The United States and circuit courts will take judicial notice of the statutes, laws and usages of the several States without requiring the same proof as of foreign laws.[1]

Statutes purporting to be published by authority of a State are admissible to prove what the statute law of such State is upon a given matter,[2] and the burden of discrediting them is upon the party against whom they are offered.[3] Printed statutes, purporting to be printed by authority of a State or country, are, however, only *prima facie* proof, and may be discredited by a copy of the statute duly certified by the secretary of State, under the seal of the State; and in some of the States an exemplified copy of the statute must be produced.[4] In other States, even the printed statute of a foreign country may be used in evidence if a witness is produced who swears that he received them from the king's printer,[5] or where it is shown that they have been sanctioned by the executive and judicial officers of such country.[6] But generally, in all of the States, a copy of the statutes of a State purporting to be printed "by authority" of the State are received as evidence, and if they are inaccurate the other party must show it. A statute and the preamble is only conclusive as to the law if any facts are recited therein, as if the preamble states "whereas, the inhabitants of Windsor county are now in a state of insur-

[1] Owings *v.* Hull, 9 Pet. (U. S.) 607; Hinde *v.* Vattier, 5 Pet. (U. S.) 398.

[2] Bright *v.* White, 8 Mo. 421; Toulandon *v.* Lachenmeyer, 6 Abb. Pr. (N. Y.) N. S. 215; State *v.* State, 1 D. Chip. (Vt.) 303; Mullen *v.* Morris, 2 Penn. St. 85; Cox *v.* Robins, 2 S. & P. (Ala.) 91 Barkman *v.* Hopkins, 11 Ark. 157; Campanet *v.* Jernegan, 5 Blackf. (Ind.) 375; Vaughan *v.* Griffiths, 16 Ind. 353; Thomas *v* Davis, 7 B. Mon. (Ky.) 227; Owen *v.* Bagle, 15 Me. 147; Merrifield *v.* Robbins, 8 Gray (Mass.), 150; Braughan *v.* Graham, 2 Miss. 220; Stewart *v.* Swanzy, 23 Miss. 502; Lord *v.* Staples, 23 N. H. 448; Kean *v.* Rice, 12 S. & R. (Penn.) 203; Allen *v.* Watson, 2 Hill (S. C.), 319; Martin *v.* Payne, 11 Tex. 292; Ellis *v.* Wiley, 17 Tex. 134; State *v.* Abbey, 29 Vt. 60.

[3] Emery *v.* Bean, 26 N. H. 152.

[4] Packard *v.* Hill, 2 Wend. (N. Y.) 411. But under the law of 1868 the authorized printed statutes of another State may now be used. Persee, &c., Paper Works *v.* Willett, 19 Abb. Pr. (N. Y.) N. S. 215; State *v.* Jackson, 2 Dev. L. (N. C.) 563; Wilson *v.* Leuzier, 11 Gratt. (Va.) 477.

[5] Jones *v.* Maffit, 5 S. & R. (Penn.) 523.

[6] Owen *v.* Bagle, 15 Me. 147.

rection, etc.," the statute is not conclusive as to the fact, and evidence is admissible to show that no such condition existed; and the same rule prevails as to any recital of facts,[1] and as to any statute, whether foreign or domestic.

The facts recited in the preamble of a private statute may be evidence between the State and the applicant or party for whose benefit the act passed. But as between the applicant and another individual, whose rights are affected, the facts recited ought not to be evidence.[2] In the case last cited, the court, in their opinion in this case, observe: "We well know that such applications are frequently made *ex parte*, and if they are not entirely so, but the party affected appears and resists the statute, it is very questionable whether the facts recited ought to be evidence in a future contest. The legislature, in all its inquiring forms by committees, make no issue, and in their discretion may or may not coerce the attendance of witnesses or the production of records, and are frequently not bound by the rules of evidence applicable to an issue properly formed, the trial of which is an exercise of judicial power. Once adopt the principle that such facts are conclusive or even *prima facie* evidence against private rights, and many individual controversies may be prejudged and drawn from the functions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the legislature are to make laws to operate on future incidents, and not the decision of or forestalling rights accrued or vested under previous laws. Hence such a preamble as the present ought, in such a controversy, to be taken to answer the purpose for which it was intended; that is, an apology for the passage of the act, and the reason why the legislature so acted. Such a preamble is evidence that the facts were so represented to the legislature, and not that they really existed." Nor will an act, private in its nature, be admissible in evidence as against strangers, although it contain a clause declaring "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of

[1] R. *v.* Greene, 6 Ad. & El. 548.

[2] Elmendorf *v.* Carmichael, 3 Litt. (Ky.) 472, 480.

without being specially pleaded." Such a clause relates merely to the forms of pleading, and does not vary the nature and operation of the act.[1] In a New York case,[2] the court held that a statute passed to confirm certain official acts of a justice of the peace, stating that he became a tavern keeper on a particular day, was not evidence of that fact as against a stranger. The legislature has no jurisdiction to determine facts touching the rights of individuals. So of various other defenses, founded upon statutes — as, for instance, the statute of limitations, which the defendant cannot avail himself of under the general issue.[3]

Sec. 210. Private Statutes.

Except where otherwise provided by statute, private acts of the legislature, as charters of private corporations, etc., must be proved, which may be done either by a copy of the act duly certified by the secretary of State, or in most of the States by the printed statutes of the State ;[4] but of all public statutes of the State in which the court is held, or which are declared to be so in the act itself, the court will take judicial notice, and no proof in reference thereto is required, and in some of the States it is provided by statute that all private acts printed in the public statutes or by authority of the State shall be received as evidence thereof.[5]

Sec. 211. Common Law of a State or Country.

The unwritten law of another State or country, when required to be proved as a fact in a case, cannot generally be proved by the printed reports of the decisions of its courts, but must be proved by witnesses learned in the law of the State.[6] But in some of the States by statute,[7] such reports

[1] Brett *v.* Beales, 1 M. & M. 421, 425.

[2] Parmelee *v.* Thompson, 7 Hill (N. Y.), 77.

[3] Levi *v.* Gadsbury, 3 Cranch (U. S. C. C.), 180.

[4] Bank *v.* Wallaston, 3 How. (Del.) 90 ; Leland *v.* Wilkinson, 6 Pet. (U. S.) 317 ; Baring *v.* Harmon, 13 Me. 361.

[5] Baring *v.* Harmon, 13 Me. 361 ; Walker *v.* Armstrong, 2 Kan. 198.

[6] Gardner *v.* Lewis, 7 Gill (Md.), 377.

[7] Lockwood *v.* Crawford, 18 Conn. 361 ; Penobscot, &c., R. R. Co. *v.* Bartlett, 12 Gray (Mass.), 244.

are made admissible. In the appellate courts, such reports are always accepted as evidence of what the courts of another State have held upon certain questions.

Sec. 212. Church Registers, Etc.

Registers kept by officials who are required by law to register particular transactions occurring in their presence, or who make such memoranda as are incident to the course of public business transacted by them, are sometimes admissible in evidence to establish facts stated therein, although no statutory provision that such registers shall be evidence of the facts contained therein exists, credibility being given thereto because they are made under the sanction of an official oath or under the duty and responsibility attaching to their official position. To entitle a book to the character of an official register it is not always necessary that it should be required to be kept by an express statute, nor even that the nature of the office should render the book indispensable. It is sufficient if it is directed to be kept by the proper officer.[1] Thus, in the case last cited the book of accounts kept by the alcalde was held admissible as a register of the acts of that officer and belonging to the office. So parish and parochial registers are evidence that the facts contained therein, *which are by law required to be recorded*, occured on the day named therein, as that a marriage between certain parties occured at the time stated in such register.[2] So the records of births and deaths kept by a religious society, when proved, are evidence of the time of the birth of a child or the death of a person.[3] But when the original is not of a public nature a sworn copy must be produced. A register book of baptisms is not evidence unless it was made at the time of the fact, or so near thereto as to preclude all idea of collusion or misrecollections, and by the minister or his clerk who witnessed the ceremony.[4] Nor generally are such reg-

[1] Kyburg *v.* Perkins, 6 Cal. 674.

[2] Wollaston *v.* Barnes, 1 M. & M. 386; Miner *v.* Boucham, 15 Johns. (N. Y.) 226; Milford *v.* Worcester, 7 Mass. 48.

[3] Stoever *v.* Whitman's Lessee, 6 Binn. (Penn.) 416.

[4] Warren *v.* Bray, 8 B. & C. 813.

isters evidence of any fact not required to be recorded in them, or which was not witnessed by the person making the entry.[1] Thus, an entry in a baptismal register is evidence of the date of baptism, but it is not evidence of the date of birth, even though it is stated therein.[2] But such a register, used for the purpose of proving the place of baptism, may also form a part of a chain of evidence to prove the birth of the person baptized within a certain parish, as where it is shown by evidence *dehors* the register that the child was very young when baptized, although the register is silent upon that point.[3] And in all cases evidence *dehors* the register is necessary to identify the parties.[4] In an English case,[5] in which an issue out of chancery as to whether a certain person was a legitimate child, a baptismal register, in which such person was described as "illegitimate," was admitted by ALDERSON, B., as affording some evidence of the fact. An entrance in a register which does not purport to be of a fact of which the person making it had knowledge, is not admissible as an entry of baptism in which the party is "said to be born in 1795."[6]

A bishop's register is, in England, evidence of facts stated in it.[7] But a register of burials kept by the Wesleyan Chapel has been there repudiated as incompetent.[8] A register of the births of dissenter's children, kept at a public library, is not evidence.[9]

A sworn copy, from the register book, of the burials in Christ Church, Philadelphia, has been received in evidence to show the fact of the death of a person and the time.[10]

In Louisiana, the register of baptisms and births is evi-

[1] Birt *v.* Barlow, Dang. 170.

[2] Wihen *v.* Law, 3 Stark. 63; Duins *v.* Donovan, 3 Hagg. Ecc. 301; Burghart *v.* Angenstine, 6 C. & P. 690; R. *v.* North Petherton, 5 B. & C. 508; R. *v.* Clapham, 4 C. & P. 29.

[3] R. *v.* North Petherton, 5 B. & C. 508.

[4] Birt *v.* Barlow, *ante;* Draycott *v.* Draycott, 12 Vin. Abr. 89.

[5] Cope *v.* Cope, 1 M. & R. 269.

[6] Duins *v.* Donovan, 3 Hagg. Ecc. 301.

[7] Arnold *v.* The Bishop of Bath, 5 Bing. 316; 2 M. & P. 559.

[8] Whittuck *v.* Waters, 4 C. & P. 375.

[9] Ex parte Taylor, 1 J. & W. 463.

[10] Lewis *v.* Marshall, 5 Pet. (U. S.) 470, 475, 476.

dence, and it seems, when shown to exist, precludes parol testimony.[1] An alteration in such baptismal register, by erasing the word "natural," and writing over it the word "legitimate," has no effect in preventing the registry from being used to establish the period of birth, though the alteration be not accounted for. Otherwise, however, if the document were offered to establish the legitimacy of the person named.[2] A register of burials is also evidence there; and where a register of baptisms proved that a child was christened by the name of "Francisco Antonio," and a register of burials attested the interment of a person named "Francisco," and no question was raised in the inferior court on the point of variance, held, that on appeal the appellate court must consider the one whose death was attempted to be proved to be the person whose death, according to the pleadings, it was important to establish.[3]

In Pennsylvania, a copy of the register of marriages, baptisms and burials, kept in a parish in the island of Barbadoes, certified to be a true copy by the rector of the parish, and proved by the oath of a witness, taken before the deputy secretary of the island and notary public (his handwriting and office being proved), has been received as good evidence of pedigree.[4] And a copy of a register of birth and deaths of the people called Quakers, kept in England, proved to be a true one before the lord mayor of London, has also been allowed as evidence in Pennsylvania to prove the death of a person.[5] By a statute in that State, the register kept by any religious society of births, marriages and deaths is declared good evidence. The act is silent as to the mode of proof, and therefore the common-law mode, which is by a sworn copy, or the production of the original, must be resorted to. A certified copy, under the seal of the corporation or religious society, is not admissible.[6]

[1] Duplessis *v.* Kennedy, 6 La. 231, 242; Fletcher *v.* Cavalier, 4 Mill. (La.) 267.

[2] Fletcher *v.* Cavalier, *supra*.

[3] Celis *v.* Oriol, 6 La. 403.

[4] Kingston *v.* Lesley, 10 S. & R. (Penn.) 383.

[5] Hyam *v.* Edwards, 1 Dall. (Penn.) 2.

[6] Stoever *v.* Whitman, 6 Binn. (Penn.) 416.

In Maine, a book was produced by a town clerk, which had been received by him from his predecessor in office as an official record; it purported to contain a record of births and marriages in such town, but contained no title or attestation of its character, nor any certificate showing by whom the entries in it were made; and held, that it was proper *prima facie* evidence to prove the age of a person named in it.[1] A copy from the records of the town is there admissible.[2]

In New York, sworn copies of such registers, when the original is of a public nature, have been held admissible.[3]

In North Carolina, a registry of births, marriages and burials, kept pursuant to the statute, is legal evidence of marriages, births, etc., especially on questions of pedigree; and the court lay it down as a general rule that a book kept by public authority is necessarily evidence of the facts recorded in it.[4]

In a New York case,[5] a sworn copy of the records of the town of Stonington, Connecticut, was held admissible in New York, on a question of pedigree. In Ohio, where the defendant, on a trial in ejectment, offered the deposition of the town clerk of New Milford, Connecticut, to prove the correctness of a copy of the records of that town, showing the time of the defendant's birth, the court held that it must be further shown that the record copied was kept under the authority of law; that a sworn copy of a private paper is nothing without proof of the original being executed, and until it was proven that the paper copied by the clerk in this case as a record was legally entitled to that character it was inadmissible.[6]

[1] Summer *v.* Sebec, 3 Me. 223. See Martin *v.* Gunby, 2 H. & J. (Me.) 248.

[2] Wedgwood's Case, 8 Me. 75.

[3] Bogert *v.* King, 5 Cow. (N. Y.) 237; Miner *v.* Boneham, 15 Johns. (N. Y.) 226.

[4] Jaycock *v.* Gilliam, 3 Murph. (N. C.) 47, 52.

[5] Miner *v.* Boneham, *ante*.

[6] Richmond *v.* Patterson, 3 Ham. (Ohio) 368.

Sec. 213. Ship Registers.

The effect of the registers of ships is of a different nature from that of parish registers. To give them the effect of proving the facts stated in them, would enable parties to make evidence for themselves; the entry not being of any transaction of which the public officer who makes the entry is conusant. The entry, therefore, or the absence of it, is a fact to be proved, and does not furnish evidence of any other fact. Thus, the register or certificate is not *prima facie* evidence of title in favor of the owner;[1] nor against him, unless proved to have been made with his consent, or to have been recognized by him.[2] But the register and certificate of register are conclusive evidence of want of title against those who are not named in the register.[3] A British register describing a vessel to be British built is not evidence of that fact.[4] The States severally have no right to require the owners of steamers navigating their internal waters to file at a seaport the name of the boat and owners, their residences and respective interests, under oath, under penalty of a forfeiture.[5] The same principle applies to steam lighters and tow-boats employed in the lower and inner bay of Mobile.[6] But the statue of the State requiring the mortgage of a vessel to be acknowledged and recorded in a particular manner is valid, so that a failure to record the mortgage renders it void as against creditors.[7] The register is not a document required by the law of nations as expressive of a ship's national character,[8] but is of local or municipal regulation,

[1] Flower *v.* Young, 3 Camp. 241; Pirie *v.* Anderson, 4 Taunt. 652.

[2] Tinkler *v.* Walpole, 14 East, 226. See also Fraser *v.* Hopkins, 2 Taunt. 5; Cooper *v.* South, 4 id. 802; Curling *v.* Robertson, 7 M. & G. 336; Young *v.* Brander, 8 East, 10; Jennings *v.* Griffiths, Ry. & M. 42; Cox *v.* Reid, id. 199; M'Iver *v.* Humble, 16 East, 169.

[3] Camden *v.* Anderson, 5 T. R. 709; explained in Tinkler *v.* Walpole, 14 East, 226; Marsh *v.* Robinson, 4 Esp. 98. And see Teed *v.* Martin, 4 Camp. 90; Robertson *v.* French, 4 East, 136; Hubbard *v.* Johnstone, 3 Taunt. 177; Thomas *v.* Foyle, 5 Esp. 88.

[4] Reusse *v.* Myers, 9 Camp. 475.

[5] Sinnot *v.* Davenport, 22 How. (U. S.) 227.

[6] Foster *v.* Davenport, 22 How. (U. S.) 244.

[7] Ætna Ins. Co. *v.* Aldrich, 26 N. Y. 92.

[8] Cheminant *v.* Pearson, 4 Taunt. 367.

and the object of it has been said to be to show the character of the vessel, and entitle her to the advantages secured by law to the vessels of our own country.[1] Transfers of ships, it seems, in England, are declared void unless certain formalities prescribed by the registry acts are pursued. But there is no corresponding provision in the act of congress.[2] The effect and competency of the register of a vessel as evidence has been considered in several cases in the courts of this country. Our laws recognize the possibility of the register's existing in one name while the ownership is in another. The ownership and character of a vessel are matters *in pais*. The register is not an exclusive test of either. Hence on an indictment for piracy, the character of the vessel plundered may be shown without any effort to produce her certificate of registry.[3] In an action to recover back a premium of insurance on the ground that the plaintiff had no interest in the vessel at the time of insurance, the register, which was in the name of other persons, was held not even *prima facie* evidence to prove that the plaintiff was not owner.[4] So where a person purchased a vessel, and took immediate possession, but it was agreed that no bill of sale was to be executed till the purchase-money was all paid, held that the vendor was not liable for repairs made to the vessel by direction of the master on the credit of the purchaser, and this though the register still stood in the name of the vendor. That circumstance, the court say, did not in any manner determine the ownership.[5] And so, in Massachusetts, where the register was relied on by underwriters in an action on a policy of insurance for the purpose of showing that two of the insured had no legal or insurable interest in the vessel.[6] In Connecticut, however, though the register of a vessel is not conclusive of ownership, yet where a person by such a reg-

[1] Sharp *v.* United Ins. Co., 14 Johns. (N. Y.) 204.

[2] Colson *v.* Bonzey, 6 Me. 474, 477. See also Bixby *v.* Franklin Ins. Co., 8 Pick. (Mass.) 86, 88, 89; Birbeck *v.* Tucker, 2 Hall (N. Y.), 121; Ring *v.* Franklin, 2 id. 1; Wendover *v.* Hogeboom, 7 Johns. (N. Y.) 308.

[3] United States *v.* Furlong, 5 Wheat. (U. S.) 184, 199.

[4] Sharp *v.* United Ins. Co., 14 Johns. (N. Y.) 201.

[5] Leonard *v.* Huntington, 15 Johns. (N. Y.) 298.

[6] Bixby *v.* Franklin Ins. Co., 8 Pick. (Mass.) 86.

ister made on his own oath appears to be the unconditional owner; held, by four judges against three, that it must be considered as a declaration to the world that he is owner, and he becomes liable, of course, for necessary disbursements in repairs and supplies procured by the master during the voyage.[1] The register cannot be rendered evidence of ownership in favor of the person who procured it to be made, though it may be against him.[2] In an action against owners of a vessel for a violation of a contract made by the plaintiffs for the transportation and delivery of goods with the master, a copy of the register, which purported to have been made on the oath of all the defendants that they were the owners, was held good evidence of their being such, and this on proof merely that the copy was a copy of the record in the custom-house, though the witness could not say whether the record was the original or a copy.[3] It is *prima facie* evidence in these and similar cases, but is not conclusive.[4] The register is used as evidence in showing a fulfillment of warranty as to the character of property in actions upon policies of insurance.[5] And in such cases it has been said that proof that there was a register is *prima facie* evidence of its being on board during the voyage.[6] The register may be proved by a sworn copy.[7] A copy certified by the collector in whose office it is recorded is not evidence. He is not authorized to certify, nor intrusted to give out copies.[8] A copy produced from the treasury department of the United States, where the original is required to be filed after a vessel is condemned, certified by the register of the department, whose official character was attested by the secretary under the seal of the department, has been held competent evidence in the case of

[1] Starr *v.* Knox, 2 Conn. 215.

[2] Ligon *v.* Orleans Nav. Co., 7 Mart. (La.) 682.

[3] Hacker *v.* Young, 6 N. H. 95.

[4] Colson *v.* Bonzey, 6 Me. 474; Cox *v.* Reid, 1 C. & P. 602; Hussey *v.* Allen, 6 Mass. 163.

[5] Catlett *v.* Pacific Ins. Co., 1 Wend. (N. Y.) 561.

[6] 1 Wend. (N. Y.) 578. See Ludlow *v.* Union Ins. Co. 3 S. & R. (Penn.) 133.

[7] Coolidge *v.* New York Firemen Ins. Co., 14 Johns. (N. Y.) 308, 315; United States *v.* Johns, 4 Dall. (U. S.) 415; Hacker *v.* Young, 6 N. H. 95.

[8] Coolidge *v.* New York Firemen Ins. Co., 14 Johns. (N. Y.) 308. See United States *v.* Johns, 4 Dall. (U. S.) 415; Woods *v.* Courter, 1 id. 141.

a condemned vessel.[1] It seems that a deputy collector's certificate of enrollment is conclusive of the facts certified.[2] The commission of a vessel or person granted by a foreign government may be proved by the commission itself under the seal of such government.[3] The seal, in general, proves itself, but otherwise as to the seal of a new government unacknowledged by the United States. The fact that the person or vessel was in the employ of such unacknowledged government may be shown without proving the seal.[4] Where the commission has been lost, its previous existence on board may be shown by parol evidence.[5] The log-book of certain vessels is, in the United States, made evidence by act of congress of the fact of desertion by a seaman. It is, however, never conclusive, but only *prima facie* evidence, and may be rebutted.[6] The log-book, in general, ought not to be admitted to establish any facts save such as are contemplated by the act of congress.[7] It is in no sense, *per se*, evidence, except in certain cases provided by statute. It does not import legal verity, and in every other case is mere hearsay not under oath. It may be used against persons, however, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their defense. But it cannot be received as evidence for such persons, or others, except by force of a statute rendering it so.[8] On an indictment of several seamen for a revolt and confining the master, they defended on the ground (among others) that the master was insane. To rebut this, the prosecutor offered the log-book, kept by the master during the period of his alleged derange-

[1] Catlett *v.* Pacific Ins. Co., 1 Wend. (N. Y.) 561.

[2] Hinckley *v.* Bridgham, 46 Me. 450.

[3] The Estrella, 4 Wheat. (U. S.) 298.

[4] United States *v.* Palmer, 3 Wheat. (U. S.) 634, 635.

[5] The Estrella, 4 Wheat. (U. S.) 298; Rundle *v.* Beaumont, 4 Bing. 537.

[6] Jones *v.* The Brig Phœnix, 1 Pet. Adm. Dec. 201; Malone *v.* The Mary, id. 140; Thompson *v.* The Ship Philadelphia, id. 210; Douglas *v.* Eyre, 1 Gilp. (U. S. C. C.) 147, 152, 153, 154; Orne *v.* Townsend, 4 Mason, 541.

[7] Jones *v.* The Brig Phœnix, *supra*.

[8] Per STORY, J., in United States *v.* Gilbert, 2 Sum. (U. S.) 77, 78.

ment, in which, as he said, he made entries every night; held, that it was inadmissible.[1] An entry in the log-book is indispensable evidence of the fact of desertion, when a forfeiture of wages is insisted on; it is necessary, in order to show that no consent was given, and no release was intended by receiving the delinquent again on board, as well as to ascertain the fact of desertion generally with greater accuracy.[2]

Sec. 214. Patents for Inventions.

A duly certified copy of a patent issued by the authority of the government, proves itself, if in due form and properly executed and certified by the proper officer under the seal of his department, and a second or duplicate patent is of as high authority as evidence as the original,[3] and the authority even of an "acting commissioner" cannot be questioned in a proceeding to which he in not a party.[4]

Sec. 215. Patents for Lands.

A copy of an old land patent which has been for many years recorded in the proper office, is admissible as evidence of title, although it does not appear that it was proved or acknowledged, or that the person signing it, signed it as governor.[5] Thus in the case last cited a copy of a patent signed "Samuel Matthers," dated 1658, and recorded in the county court, together with an assignment of it, which assignment was acknowledged and admitted to record, was held evidence of title in Virginia, although it did not appear that the patent was proved or acknowledged, or that it was signed by Matthers, as governor. A complainant alleged in his bill the grant by letters patent of the estate claimed in 1705, and afterward, on the introduction of the letters patent by the defendant, objection was made because they did not bear the governor's signature. It was held that the letters patent

[1] United States *v.* Sharp, 1 Pet. (U. S. C. C.) 118, 119.

[2] Malone *v.* The Mary, 1 Peters' Adm. Decis. 140; Phœbe *v.* Dignum, 1 Wash. C. C. Rep. 48; Douglas *v.* Eyre, Gilp. (U. S. C. C.) 147.

[3] Hines *v* Greenlee, 3 Ala. 73; Peck *v.* Farrington, 9 Wend. (N. Y.) 44; Davis *v.* Gray, 17 Ohio St. 330.

[4] Woodworth *v.* Hall, 1 W. & M. (U. S. C. C.) 389.

[5] Lee *v.* Lappscott, 2 Wash. (Va.) 276.

were valid without the governor's signature, because, as the royal grants were made by record, and not by deed, and the letters patent were mere transcripts of the record, the great seal affixed to the transcript was evidence of the grant to the public.[1] A certificate of purchase from one of the United States land offices, is evidence of an equitable interest in the purchaser.[2] The admission of a patent to be read in evidence was objected to because the letter C, used as a Roman numeral, was interlined; but it was admitted, on the presumption that the interlineation was made before issuing the patent: and the admission was held not to be error.[3] Assignments of land certificates, left in the general land office to procure a patent, are not admissible in evidence as "copies of records," etc., until constituted and recognized as records by the issuing of the patent.[4] An entry, in the books of the land office, that the balance of the purchase-money was paid by the person "to whom the patent had issued," is evidence that a patent did issue, although the patent is not produced.[5] A patent issued on a military land warrant, under the law of a State, is held to be *prima facie* evidence that every prerequisite of the law has been complied with.[6] A copy of the final certificate of lands, granted to a patentee by the United States, and of an assignment indorsed thereon by the patentee, certified by a justice of the peace, who is certified to be such by the register of the land office, is not admissible in evidence.[7] Nor is a patent from a State, of lands sold as swamp or overflowed lands, *prima facie* evidence as against a claimant under the government that such lands are swamp and overflowed.[8] A patent for United States land, which appears to have been signed by the president, countersigned by the commissioner of the general land office, and verified by the seal of that office, is admis-

[1] Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

[2] Kay *v.* Watson, 17 Ohio, 27.

[3] Stevens *v.* Martin, 18 Penn. St. 101.

[4] Short *v.* Wade, 25 Tex. 510.

[5] Willis *v.* Bucher, 3 Wash. (U. S.) 369.

[6] Bouldin *v.* Massie, 7 Wheat. (U S.) 122.

[7] Scott *v.* Hancock, 3 Stew. & P. (Ala.) 44.

[8] Keeran *v.* Allen, 33 Cal. 542.

sible as evidence, without proof of its execution.[1] But a surveyor's having admitted an entry, or made a survey, or a patent having issued, in a certain name, is no proof that there is a person bearing that name.[2] Nor is the report of a surveyor, unaided by a certificate of survey or patent, sufficient to prove the land, described as belonging to a certain person, to have been in fact surveyed for him, and included in his patent.[3] The time when a certificate was returned to the land office is matter of fact, determinable by the jury. Thus a petition to the judges of the land office by one A., with certain alterations made therein in the handwriting of a clerk of that office, since dead, stating when the certificate was returned, was not admitted in evidence to prove at what time it was returned, or to prove that it was returned before a certain period, as the party against whom the testimony is intended to operate did not derive any interest in the land under A.[4] In an action of ejectment by A. against B., a patent certificate to A.'s legal representatives, without other evidence, cannot be received in evidence, and such certificate is no evidence of title in A.[5] Upon issue joined whether A. could have procured a title from the United States to a certain tract of land located by him by virtue of a New Madrid certificate, it was held that a patent and certificate of survey to B. for the same tract is not admissible.[6]

Sec. 216. Copies.

In most cases, where by statute certain instruments are required to be recorded in a certain manner, a copy thereof, duly certified by the proper recording officer, is admissible in evidence where the contents of the instrument becomes material; but although an instrument has been in fact recorded, yet unless it belonged to the class entitled by statute to be recorded its contents cannot be proved by copy,[7]

[1] Bowser *v.* Warren, 4 Blackf. (Ind.) 522.

[2] Finlay *v.* Humble, 2 A. K. Mar. (Ky.) 569.

[3] Rice *v.* Welch, 1 Litt. (Ky.) 74.

[4] Hammond *v.* Warfield, 2 H. & J. (Md.) 151.

[5] Matingly *v.* Hayden, 1 Mo. 439

[6] Green *v.* M'Girk, 1 Mo 498.

[7] Childress *v.* Cutter, 16 Mo. 24; N. Y. Dry Docks *v* Hicks, 5 Mc-

although it is held in some of the cases that with other proof of the execution of the instrument a certified copy thereof may be evidence.[1] There are four classes of copies, to wit: 1st. Exemplifications; 2d. Office copies; 3d. Examined copies; and 4th. Certified copies.

Exemplified copies are those which are certified under the great seal (State or national), and those which are certified under the seal of the court in which the record may be preserved. But even an exemplified copy is not admissible in evidence, unless the instrument is one which is required to be kept or recorded in the department of the government in which it is deposited. Thus an exemplified copy of private deeds is not admissible, and the same is true of any private document or instrument.[2] But an exemplification of any instrument, produced from the proper custody, is evidence. Thus, an exemplified copy of a commission from the government has been held to be evidence, although the seal has been lost.[3]

When the right to read an official copy is claimed under a statute declaring such copy evidence, it must appear that all formalities prescribed by the statute have been strictly pursued.[4]

Indeed, it is held that an exemplified or certified copy of a sealed instrument, need not reproduce the seal. Indicating that there was a seal, by the letters "L. S." or the like, is enough.[5]

Lean (U. S.), 111; Miles *v.* Knatt, 12 G. & J. (Md.) 442; Rashin *v.* Shields, 11 Ga. 536; Thomas *v.* Grand Gulf Bank, 17 Miss. 201; James *v.* Gordon, 1 Wash. (U. S. C. C.) 323; Berry *v.* Matthews, 13 Md. 537.

[1] Webster *v.* Harris, 16 Ohio, 490; Carroll *v.* Norwood, 1 H. & J. (Md.) 167; Parnell *v.* Knox, 16 Ala. 364; Mitchell *v.* Mitchell, 3 S. & P. (Ala.) 81.

[2] Buller's N. P. 227.

[3] Beverley *v.* Craven, 2 M. & K. 140.

[4] Smith *v.* United States, 5 Pet. (U. S.) 292; Crayton *v.* Munger, 11 Tex. 234; Butler *v.* Dunnagan, 19 Tex. 559; McDuffie *v.* Greenway, 24 id. 625; Dixon *v.* Thatcher, 14 Ark. 141; Smith *v.* Brannan, 13 Cal. 107; Brown *v.* Cady, 11 Mich. 536; Maxwell *v.* Light, 1 Call. (Va.) 117.

[5] Holbrook *v.* Nichol, 36 Ill. 161; State *v.* Bailey, 7 Iowa, 390; Hedden *v.* Overton, 4 Bibb (Ky.), 406. Compare Falcott *v.* Delaware Ins. Co., 2 Wash. (U. S.) 449.

A copy of an instrument, within the purview of the stamp act, made previous to the act, may be used in evidence without being stamped.[1]

The certificate of a copy from an official record, must be by the officer having the record in charge, and authorized to certify. A copy certified by a stranger or by an officer wholly unauthorized, cannot be received.[2]

It seems, however, that to certify copies is within the ordinary powers of a duly appointed deputy of the officer named by law to keep the charge of a record; and a copy certified by a deputy acting for his principal, is good.[3]

The certificate which is allowed to be read in evidence in lieu of the production of papers which have been recorded or deposited in a public office, *is a certificate to a copy of the instrument.* A certificate by the officer that certain facts appear by the records or papers on file in his office cannot be received under statutes authorizing the use of certified copies.[4]

An *office copy* is a copy made by an officer having the custody of the document in the same court; and in the same cause such a copy has all the force of the original.[5] Thus, an office copy of depositions in chancery are evidence in that court, but they would not be admissible in a court of law, without examination,[6] except in the trial of an issue out of chancery;[7] and it is by no means certain that such copies are admissible, even in that case.[8] To illustrate the rule

[1] Montgomery *v.* Black, 4 H. & M. (Md.) 391.

[2] Schnertzell *v.* Young, 3 Har. & M. (Md.) 502; Woods *v.* Banks, 14 N. H. 101; State *v.* Clark, 24 N. J L. 516; Devling *v.* Williamson, 9 Watts (Penn.), 311; Hockenbury *v.* Carlisle, 1 W. & S. (Penn.) 282.

[3] Hague *v.* Porter, 45 Ill. 318; Greason *v.* Davis, 9 Iowa, 219; Moore *v.* Farrow, 3 A. K. Mar. (Ky.) 41; Triplett *v.* Gill, 7 J. J. Mar. (Ky.) 438; Rives *v.* Rives, 4 id. 533.

[4] Draughan *v.* The Tombeckbee, 3 Stew. (Ala.) 54; Olven *v.* Boyle, 15 Me. 147; Maguire *v.* Sayward, 22 id. 230; English *v.* Sprague, 33 id. 440; Frute *v.* McDonald, 27 Miss. 610; Drake *v.* Merrill, 2 Jones L. (N. C.) 368; Barry *v.* Rhea, 1 Overt. (Tenn.) 345; Davis *v.* Loftin, 6 Tex. 489; Struthers *v.* Reese, 4 Penn. St. 129.

[5] Lucas *v.* Fulford, 2 Burr. 1179.

[6] Buller's N. P. 229.

[7] Highfield *v.* Peake, M. & M. 109.

[8] Burnaud *v.* Nerat, 1 C. & P. 578.

that office copies are only admissible in the same court and in the same cause, it may be said that when a sheriff is sued for a false return, an office copy of the writ and return, although in the same court, is not admissible, for the reason that the cause is a different one.[1] But in such cases the copies should be compared with the original by a person who can swear to their accuracy.

An *examined copy* is a copy of a document of a *public nature*, which is required to be kept, made by some person who can swear to its accuracy, or which has been compared with the original, word for word and line by line, by the witness who swears to its accuracy. What are public documents in the sense that an examined copy thereof is admissible does not clearly appear, and has never been accurately defined, but the term to include all documents in which the community at large is interested, and which it is desirable not to remove from their place of deposit.[2] The term would clearly include all records of any court whatsoever, and all registers of births, deaths and marriages; registers having reference to shipping and navigation, to trade and to the public health. The rule applies equally to such public registers kept abroad, as there is a presumption that the foreign authority in whose custody they are would not allow their removal to another country.[3]

An examined copy of a record or other document must be proved by a witness who has examined it line for line with the original, or who has examined the copy while another person read the original.[4] And it is not necessary for the persons examining to exchange papers and read them alternately.[5] The copy must not contain abbreviations which do not occur in the original.[6] Where an examined copy is put in evidence some account should be given of the original record; thus, it ought to be shown that the record from which the copy was taken was seen in the hands of the

[1] Pitcher *v.* King, 1 C. & K. 655.
[2] Lynch *v.* Clerke, 3 Salk. 154.
[3] Lanesborough's Claim, 1 H. L. C. 510, n.; Abbott *v.* Abbott, 29 L. J., P. M. & A. 57.
[4] Reid *v.* Margison, 1 Camp. 469.
[5] Gyles *v.* Hill, 1 Camp. 471, n.; Rolf *v.* Dart, 2 Taunt. 52.
[6] R. *v.* Christian, C. & M. 388.

proper officer, or was in the proper place for the custody of such records.[1]

In this country, as a rule, where a document is in the custody of an officer, who is required to keep it, a certified copy thereof made by him is admissible,[2] and this obviates to a large extent the necessity for examined copies, although in some of the States such certified copies are not received.[3]

A copy of a policy of insurance, proved to have been compared with the original register on the books of the insurance company, and notice given to produce the original cannot be read in evidence, the register in the hands of the company should be exhibited, after proving the existence of the original policy.[4] Nor can a copy be received in evidence unless the witness producing it makes oath that he compared the copy with the original.[5] And generally a sworn copy is not evidence, if objected to.[6] A copy of articles of agreement, the authenticity of the original having been often acknowledged by the adverse party, may be admitted in evidence on proof of its being a true copy.[7] Sworn copies of a marriage contract, executed in the presence of the lieutenant-governor and Spanish commandant of upper Louisiana, with the certificate of the commandant that it was a copy of the original deposited among the archives of said territory, have been held not good evidence of the marriage.[8] Proof that a paper, offered as evidence in a cause, is a true copy of the original admitted to be lost, was held to be sufficient to authorize its going to the jury.[9] When a record has become illegible by lapse of time, the testimony of a witness who had examined and copied it while legible, is properly received

[1] Adamthwaite *v.* Synge, 1 Stark. 183; 4 Camp. 372.

[2] Oakes *v.* Hill, 7 Pick. (Mass.) 442; United States *v.* Perchman, 7 Pet. (U. S.) 51; United States *v.* Johns, 4 Dall. (U. S.) 412.

[3] Hathaway *v.* Goodrich, 5 Vt. 65; Stephen *v.* Clements, 2 N. H. 390.

[4] United States *v.* Shearman, Pet. (U. S. C. C.) 98.

[5] Catlin *v.* Underhill, 4 McLean, 199.

[6] Fitzgibbon *v.* Kinney, 3 Harr. (Del.) 317.

[7] Stevenson *v.* Dunlap, 7 T. B. Mon. (Ky.) 134.

[8] Chouteau *v.* Chevalier, 1 Mo. 343.

[9] Bullit *v.* Overfield, 2 Mo. 4.

to supply the defect.[1] An examined copy of an instrument which it is the duty of a public officer to record and give copies of, may be received in evidence, in any proper case, without proof of the original.[2] Certified copies are those which are certified to be accurate by some officer who has the custody of the original, or of the records thereof, *and are only admissible, as a rule, where the original document is required by law to be recorded or kept in the office over which the person certifying the copy presides.* In some of the States, even where by law a document is required to be recorded in a certain office, a certified copy thereof is held not to be admissible in evidence unless the statute makes it so, or a foundation is first laid for the admission of secondary evidence. But as in most of the States the rule is otherwise, and as the matter is one with which the practitioner in a given State is presumed to be familiar, it will not be practicable to refer to the cases or the instances in which this exception to the general rule is held.

An official copy duly exemplified or certified, and within the limits authorized by a statute, is received as *prima facie* evidence of its contents, and of all the circumstances necessary to authorize the copy to be used without collateral proof.[3] And the person who made or examined the copy is not excluded from the privilege of using it in evidence.[4] Statutes enabling a party to use official copies of writings in evidence, do not impair the effect of the originals if they can be produced.[5] Nor are they exclusive of the common-law rules allowing the execution and contents of deeds to be proved by secondary evidence.[6]

[1] Little *v.* Downing, 37 N. H. 355.

[2] Farrar *v.* Fessenden, 39 N. H. 268.

[3] Warner *v.* Hardy, 6 Md. 525; McCauley *v.* State, 21 id. 556; Bryan *v.* Wear, 4 Mo. 106; Snyder *v.* Bowman, 4 Watts (Pa.), 133.

[4] Lynde *v.* Judd, 3 Day (Conn.), 499; Ratcliffe *v.* Trimble, 12 B. Mon. (Ky.) 32.

[5] Dobbs *v.* Justice, &c., 17 Ga. 624; Goodwyn *v.* Goodwyn, 25 id. 203; Vose *v.* Manley, 19 Me. 331; Day *v.* Moore, 13 Gray (Mass.), 522; King *v.* Kenney, 4 Ohio, 83; Sheehan *v.* Davis, 17 Ohio St. 157; Miller *v.* Hale, 26 Penn. St. 432.

[6] Loftin *v.* Nalty, 24 Tex. 565; United States *v.* Lamb, 12 Pet. (U. S.) 1.

Sec. 217. Instances in which Certified Copies, etc., have been Held Admissible.

The certificate of the secretary of state of the general government under his seal of office, that a particular person had been recognized by the department of state as a foreign minister, has been received as full evidence of his official standing,[1] on an indictment for arresting the person so accredited contrary to an act of congress. So on an indictment for an assault and battery upon an attaché and secretary to the legation of Spain, the certificate of the secretary of state was held the highest and the best evidence of the official character of the complainant.[2] In the latter case the certificate was dated after the assault, and stated that Mr. Feronda, charge d'affaires of Spain, had introduced the complainant as a gentleman attached to the legation, and performing the duties of secretary of legation.[3]

But the certificate of an American consul, residing in a foreign country, attesting the official character of a person there, is not evidence, because it is not within the range of consular duties.[4] But under the statute of New York, the acknowledgment of a power of attorney purporting to have been taken before a consul of the United States, resident in a foreign country, certified by him in the proper form and authenticated by his official seal, is sufficient proof of the execution of the power without any evidence *aliunde* of the genuineness of the signature or seal.[5]

Where the official character of a notary abroad is sought to be proved, a certificate under the national seal of the foreign country, attesting that the person certifying the instrument is a notary by regular appointment, would be evidence.[6] The notary's certificate under seal proves itself.[7]

In New Hampshire, it has been held that the certificate of

[1] United States *v.* Banner, 1 Bald. (U. S. C. C.) 234.

[2] United States *v.* Liddle, 2 Wash. (U. S. C. C.) 205.

[3] United States *v.* Ortega, 4 Wash. (U. S. C. C.) 531.

[4] Stein *v.* Stein's Curator, 9 La. 277, 281; Las Caggas *v.* Larionda's Syndics, 4 Mart. (La.) 283; Church *v.* Hubbart, 2 Cranch (U. S), 236.

[5] St. John *v* Creel, 5 Hill, 573.

[6] Las Caggas *v.* Larionda's Syndics, *ante*.

[7] Bank *v.* Gray, 2 Hill (N. Y.), 227.

the county clerk in New York, under the seal of the county, is competent evidence to show that an individual, who had acted as magistrate in taking a deposition in the latter State, was, in fact, a justice of the peace. The decision goes upon the ground that the evidence of the due appointment of justices in New York is found in the clerk's office of the respective counties, and that the clerk of the county in which the justice resides is the proper certifying officer to these facts.[1]

The certificate of an officer, by way of attesting an independent fact, and not to authenticate copies, etc., is hardly ever admissible, unless rendered so by positive statutory enactment. Accordingly, the certificate of the secretary of North Carolina, that a grant had not been recorded in his office, was held in Tennessee to be no evidence. The business of a keeper of records, say the court, is not to certify the official order of papers from which official facts are inferred. The general scope and substance of the certificate might more properly furnish matter for a deposition.[2] On the same principle, the certificate of a clerk, containing a historical account of the proceedings of a court, has been held inadmissible; he should certify a copy.[3] So too of certificates to prove the loss of papers, which, it is said, must be shown in the ordinary way of proving other facts.[4]

In New York, it is provided by statute that when any officer, to whom the legal custody of any document or paper shall belong, shall certify under his official seal that he has made diligent examination in his office for such paper, and that it cannot be found, such certificate shall be presumptive evidence of the facts so certified in all causes, matters and proceedings, in the same manner and with the like effect as if such officer had personally testified to the same, and copies of all papers filed with the county clerk are by statute rendered evidence in all courts, when certified by him, in like

[1] Dunlap *v.* Waldo, 6 N. H. 450.

[2] Ayers *v.* Stewart, 1 Overt. (Tenn.) 221.

[3] Barry *v.* Rhea, 1 Overt. (Tenn.) 345; Wilcox *v.* Ray, 1 Hayw. (N. C.) 410.

[4] Robinson *v.* Clifford, 1 Wash. (U. S. C. C.) 1; Wilcox *v.* Ray, 1 Hayw. (N. C.) 410. Though this is otherwise in Pennsylvania. See Ruggles *v.* Alexander, 2 Rawle (Penn.), 232.

manner as if the originals were produced; and under the statute a certified copy of an oath of office so filed is admissible in evidence in a suit by the officer for his services.[1] In relation to chattel mortgages, the clerk's certificate is rendered evidence of the filing; but the mortgage must be produced and proved by common-law evidence; the certificate of the town clerk is not evidence that the paper certified as such is a copy.[2] The agent selling under does not require an exact copy.[3] The general principle as to certificates of an independent fact seems to have been acted on in Vermont in a case where the defendant, in ejectment, in establishing a vendue title arising out of the collection of special taxes, produced a certificate from the clerk stating at what sum the committee's account of their expenditure of tax, prior to the sale, was allowed; and it was held not admissible, and that a certified transcript of the record of the account kept by the clerk, and of the allowance upon the same, was the only legitimate evidence.[4] So, in North Carolina, where the clerk was authorized by statute to certify the record of certain bonds, and he certified that "the following, and none other, were the bonds," etc.; held, that what the clerk had attested as a record was admissible, but that which he certified, not as a record, but a fact, viz., that no other bonds were given, was not evidence, because he did not do it officially.[5] In Ohio, where, in making title under a judgment and execution, the execution, as certified by the clerk, varied from the judgment; held, that though the fact of such execution having issued on the judgment produced, might be shown, notwithstanding the variance, yet it could not be established by the clerk's certificate. His certificate is good so far as it relates to matter of record, or copies of papers filed in his

[1] Devoy *v.* Mayor, &c., of New York, 35 Barb. (N. Y.) 264.

[2] Bissell *v.* Pearce, 28 N. Y. 252. See also Fellows *v.* Hyring, 23 How. Pr. (N. Y.) 230.

[3] Dane *v.* Mallory, 16 Barb. (N. Y.) 46.

[4] Coit *v.* Wells, 2 Vt. 318.

[5] Governor *v.* McAffee, 2 Dev. (N. C.) 15. This doctrine prevails in Massachusetts (Oakes *v.* Hill, 14 Pick. [Mass.] 442); and in New York (Wolfe *v.* Washburn, 6 Cow. [N. Y.] 261, 265.)

office. But he cannot certify independent facts within his knowledge; to prove such things he should be sworn.[1]

In general, where an officer is not required by law to certify his doings, and he does so, his certificate is not evidence.[2] Both of the cases cited in the last note were instances of certificates upon process by way of return, when no such return was authorized. In those cases where the law makes it the duty of an officer to make a return, and holds him responsible for its truth, it is generally evidence. Where an officer is authorized by statute to certify, and his certificate is rendered evidence, the statute is not to be so construed as to authorize him to certify to what he must necessarily derive from mere hearsay, unless the legislature have so expressly enacted.[3] Under this rule, in North Carolina, where the certificate of an adjutant-general is made evidence by statute of certain delinquencies in not making returns, it was held that it was not evidence of such delinquencies as consisted in neglecting to make returns to other officers, but only of such as related to returns to be made to himself, because as to the former he could have no official knowledge, and must rely entirely upon hearsay.[4] Upon the same principle, a law of congress, authorizing transcripts of treasury accounts to be received as evidence, was held to extend to such accounts only as arose through the direct official dealings of the department, and an account for moneys received by a deputy commissary, from a deputy quartermaster, to the use of the United States, is not within the provision. "An account stated at the treasury department," say the court, "which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by the books. In these cases, the officers may well

[1] Bank of the United States *v.* White, 1 Wright (Ohio), 51, 52.

[2] Hathaway *v.* Goodrich, 5 Vt. 65; Stephen *v.* Clements, 2 N. H. 390.

[3] See Johnson *v.* Hocker, 1 Dall. (U. S.) 406; Stewart *v.* Allison, 6 S. & R. (Penn.) 324, 329.

[4] Governor *v.* Jeffreys, 1 Hawks (N. C.), 207. See Governor *v.* Bell, 3 Murph. (N. C.) 331.

certify, for they must have official knowledge of the facts certified. But where moneys come into the hands of an individual, as is the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established, not by the treasury statement, but by the evidence on which that statement was made."[1] And where an officer's certificate is made evidence, by statute, of certain facts, he cannot extend its effects to others by incorporating them with those to which he is authorized to certify. Accordingly, in North Carolina, under the statute above referred to, in an action brought to recover a penalty imposed upon a militia officer for delinquency in not making a return, it was held that the adjutant-general's certificate could not reach beyond the fact of the delinquency, and though he had also certified that the defendant was an officer, yet the court decided that the certificate was no evidence of this, but that it must be proved independently.[2] So, though the certificate of the inspector of ashes, in the city of New York, was made presumptive evidence by statute of the facts contained in it, yet it was held that this must be understood in reference to those facts to which the statute has authorized him to certify, viz., the fact of inspection, the quality, weight, tare, crustings, scrapings, etc. These he may certify, but not as to the title. In respect to the latter, he has no power to certify, and his certificate will not be regarded as evidence on questions relating to it.[3] In such cases, the certificate is not to be rejected altogether, *but such parts as are pertinent and official* may be read. Thus, in an action on a bond, a certificate of an officer was introduced, which, by the local law, was competent evidence of payment, but which also stated that a tender had been made to the plaintiff in the suit in the presence of H. and R., and that he had refused to receive it; M'KEAN, C. J., delivering the opinion, said: "We certainly should not permit Mr. S.

[1] United States *v.* Buford, 3 Pet. (U. S.) 12, 29.

[2] Governor *v.* Bell, 3 Murph. (N. C.) 331.

[3] Williams *v.* Merle, 11 Wend. (N. Y.) 80, 82.

(the certifying officer), if he were here present, to swear that he was told that such persons were present at the tender; but the question is, whether, having certified what he ought not to certify, the whole ought to be rejected. We think it ought not. The papers should be admitted to prove that payment was made agreeably to the act of assembly, at the time mentioned. All the rest may be struck out; or indeed, only so much as goes to that point be read and admitted to be proved." He accordingly read to the jury so much as related to the receipt, and suppressed the rest.[1] Certificates are to be confined, in their operation and effect, to the special purposes contemplated by the law authorizing them. Thus, in New Jersey, a certificate of surveyors of highways, and in the New York phrase, "fence viewers," adjudging where the parties therein mentioned should set their partition fence, were held not admissible evidence on the question of title. The order of the surveyors is intended by statute for fixing the place of a temporary partition fence until the place shall be legally settled, and to enable the party making the fence to recover from the other his just proportion of the expense.[2] The certificate must be by the proper officer. The certificate of the register of the treasury department of the general government, under his hand, was offered to show that certain receipts, copies whereof were annexed, were on file in his office. This was accompanied by the certificate of the secretary of the treasury, under the seal of the department, that the person signing the same was register; yet it was held not evidence, for although the register might have the custody of the papers, yet he is not authorized by law to certify them.[3] The certificate should, in general, be by the officer who has at the time the legal custody of the evidence. Thus, to prove certain passengers, imported by the defendants into Pennsylvania, to be convicts, and to have undergone punishment in the Spiel-House of Hamburgh, in Germany, a written report was returned with a commission issued in the

[1] Johnson *v.* Hocker, 1 Dall. (Penn.) 406. See Wolfe *v.* Washburn, 6 Cow. (N. Y.) 265.

[2] Corlis *v.* Little, 12 N. J. Eq. 229.

[3] Bleecker *v.* Bond, 3 Wash. (U. S. C. C.) 529.

cause, containing a list of the convicts in the Spiel-House, which report appeared to have been signed by the *late directors* of the Spiel-House. The court held the paper as not competent evidence. "It is not," said they, "an *official* paper certified by the proper officers, who at the time had the custody of the Spiel-House or of the books. They style themselves *late* directors."[1]

All certificates, receipts, accounts stated, or other papers framed by private persons, stand upon the footing of mere naked hearsay, and they are never allowed to possess any intrinsic force as evidence against third persons, and cannot be received to affect the rights of a party.[2] So the certificate of an attorney, to prove that a judgment had been obtained on certain notes, is held inadmissible.[3]

Certain receipts of public officers have made an exception. In Louisiana, the receipt of the receiver of public moneys for government lands has often been held sufficient to show that the title is out of the government.[4] Where land has been sold for taxes, a receipt of the treasurer for the surplus bond required of the purchaser by the act of assembly, is evidence, in favor of the purchaser, of the fact that such bond had been executed and delivered.[5] Payment for land, made to the officers of the land office, may be proved in that State by the officer's receipt. On the same principle, it has been usual to admit the receipts or certificates of deputy surveyors for their fees and expenses of survey. But a certificate of the latter kind, given after the deputy had ceased to hold the office, attesting the fact of his having received the fees, etc., at *a previous time*, and not at the time the money was paid, is not evidence to affect third persons.[6]

In respect to foreign certificates, they have occasionally been admitted, as well as rejected, upon grounds from which

[1] Jones *v.* Ross, 2 Dall. (Penn.) 143.

[2] Paull *v.* Mackey, 3 Watts (Penn.), 110; English *v.* Hannah, 4 id. 424; Cutbush *v.* Gilbert, 4 S. & R. (Penn.) 551, 555, 556.

[3] Tuthill *v.* Davis, 20 Johns. (N. Y.) 285.

[4] Newport *v.* Cooper, 10 La. 155; Goddard *v.* Glodinger, 5 Watts (Penn.), 209; Cluggage *v.* Swan, 4 Binn. (Penn.) 150.

[5] Fager *v.* Campbell, 5 Watts (Penn.), 287.

[6] Cluggage *v.* Swan, 4 Binn. (Penn.) 150.

it is difficult to deduce any rules of a very general nature. Where it is probable that the officer of another country would not make a deposition, his certificate has been received. Thus, to prove that the governor of the island of St. Thomas refused a captain's petition for leave to take away the cargo of a vessel, the governor's certificate, given at the time of the petition, was offered; it was not under seal, but was proved to be in his handwriting, and the court admitted it, saying: "The certificate is of an official act, given at the time, by which it appears the captain petitioned for leave to take away the cargo, which the governor refused. We know no way by which that fact could be better proved than by this certificate, unless the deposition of the governor had been taken, which it is not to be supposed he would have consented to give. This is very different from evidence of matters not official, in which latter case such certificate could not be admitted."[1] In another case, the certificate of the collector of Havana was offered; it was under his official seal, and stated the arrival of a certain ship at that place for the purpose of watering; that, to effect this object, the captain was obliged to present himself to the intendent-general of the royal armies and treasury, by whom the ship's cargo was *decreed* to be sold, on account of the scarcity, at that place, of the articles of which it consisted. It appeared that the collector was authorized to grant such a certificate, by a local law of Cuba, and indeed that he alone could do so; but the court denied that it was evidence. "We admit," say they, "it is an authentic instrument; but still it is only an *ex parte* certificate of a fact, which the officer was authorized to certify; but is not the best evidence which the case admits of, because the deposition of the officer might have been taken; and it was important for the defendant to have had the privilege of cross-examining, particularly for the purpose of eliciting the true cause of the order of sale."[2] WASHINGTON, J., added, that although it appeared that the Spanish verb, which in

[1] United States *v.* Mitchell, 3 Wash. (U. S. C. C.) 95, 96.

[2] Wood *v.* Pleasants, 3 Wash. (U. S. C. C.) 201, 203.

this certificate was translated "decreed," means also "ordered, resolved, determined," and does not necessarily imply that it was in writing; yet that the decrees of every civilized country, in respect to the sale or disposition of property, ought to be presumed written until the contrary appears. If, he said, it had appeared that the decree was not in writing, evidence of its purport, taken in a proper manner, might be received; or if it had appeared that the officer who gave the certificate would not be permitted, by the government of Havana, to give a deposition, inferior evidence, in that case, might be received.

Where the statute allows certain facts to be proved by the certificate of an officer, the certificate must comply with the requirements of the statute in form and substance.[1] When the certificate is made according to law, as required in the organization of banking associations, and acknowledged and recorded, it becomes evidence of the organization.[2] So the certificate of the organization of a transportation company is conclusive evidence of the matters therein stated pursuant to the requirements of the statute.[3] No greater effect, however, will be given to the certificate than what the statute evidently contemplated; thus, the inspector's certificate under section 34 of the plank-road act showing the completion of the road, does not estop the State from inquiring into the manner in which the road has been constructed.[4] Such companies were organized by the filing of articles of association and were allowed to erect toll-gates and collect tolls when they had completed a certain number of consecutive miles of the road, as shown by the inspector's certificate duly filed; this certificate properly drawn was made the evidence of the fact certified and conclusive between the road and individuals.[5] So where a village corporation was authorized to issue its bonds and negotiate them for a railroad corporation after a certain amount of its capital stock, $500 000, should be sub-

[1] Rogers *v.* Jackson, 19 Wend. (N. Y.) 383.

[2] Burrows *v.* Smith, 10 N. Y. 550.

[3] Western Trans. Co. *v.* Scheu, 19 N. Y. 408.

[4] People *v.* Fishkill & B. Plank Road Co., 27 Barb. (N. Y.) 445.

[5] The Hammondsport, &c., Plank Road Co. *v.* Brundage, 13 How. Pr. (N. Y.) 448.

scribed, such subscription to be certified by commissioners and their certificate filed; it was held in favor of a *bona fide* holder of one of the bonds thus negotiated, that the certificate thus made was conclusive of the fact certified.[1] So the appointment of trustees of a concealed, absconding or non-resident debtor is held conclusive evidence under the statute of the regularity of previous proceedings.[2]

Where public officers are authorized by law to certify to certain facts, their certificates to those facts are competent evidence thereof.[3] Thus, the certificate of a public officer, of acts done in the execution of his duty, is not to be impeached by the evidence of a single witness;[4] but extra official certificates, made by an officer, are not admissible in evidence.[5] But a certificate of a public officer can only authenticate copies. It cannot prove a fact as the non-appearance of a certain name on the records.[6] An officer of one State has no power to certify to the official character of a person who holds his appointment under another State.[7] The certificate of the register of births and deaths for the parish of Orleans is held to be a legal document, creating of itself a *prima facie* presumption of the death of a party.[8] Where an act of the legislature directs that the certificate of a public officer shall be evidence, a paper produced with his name will be *prima facie* evidence, unless the name is proved not to have been signed by him.[9] But an official certificate is evidence only so far as the matter certified comes within the official duty or cognizance of the officer,[10] and the mere statement of a fact in writing, by a person not acting in any official capacity, is not a certificate, and the calling it by that name cannot alter its character or clothe it with official so-

[1] Bank of Rome *v.* Village of Rome, 19 N. Y. 20.

[2] Wood *v.* Chapin, 13 N. Y. 509.

[3] Levy *v.* Burley, 2 Sumn. (U. S.) 335; Guno *v.* Jamis, 6 Mo. 330.

[4] Brown *v.* Galloway, Pet. (U. S. C. C.) 291.

[5] Woods *v.* Nabors, 1 Stew. (Ala.) 172.

[6] Martin *v.* Anderson, 21 Ga. 301.

[7] O'Bannon *v.* Paremour, 24 Ga. 489.

[8] Succession of Jones, 12 La. Ann. 397.

[9] Prather *v.* Johnson, 3 H. & J. (Md.) 487.

[10] Newman *v.* Doe, 5 Miss. 522.

lemnity.[1] The certificate of an officer, when by law evidence for others, is competent evidence for himself, provided he was, at the time of making it, competent to act officially in the matter to which it relates.[2] The certificate of a governor of a foreign island, registered in the admiralty by Martinique, relative to an order issued by him, is held evidence to go to a jury ;[3] so the official certificate of the secretary of the government of Florida during the dominion of Spain over the territory, after evidence that no originals could be found in the proper office, was held sufficient evidence of the copies of the petition and decree of the governor, no proof having been given to impair or contradict the force of the same.[4] The certificate of the governor of St. Thomas (the signature being proved), without a seal, given at the time the captain petitioned for leave to depart with his cargo, that such petition was refused, was held to be an official act, by a person who, it is probable, would not give a deposition, and is different from matters not official, and might be read in evidence.[5]

The certificate of the secretary of an incorporated company, bearing its seal, affords *prima facie* evidence of the facts therein stated. The court is bound to presume, from such certificate, that legal notice was given to the stockholders of the company of a meeting of which they were entitled to be notified.[6] So the certificate of a commissioner for Louisiana of the official capacity of the clerk of a county court in another State, affords *prima facie* presumption of the legal authority of the clerk to do what he is shown to have done, to wit, to receive the acknowledgment of a deed.[7] A secretary of a banking corporation is not a certifying officer, and therefore his copies must be sworn to.[8] So the certificate of the clerk of a religious society that a person had ceased to

[1] Runk *v.* Ten Eyck, 24 N. J. L. 756.

[2] McKnight *v.* Lewis, 5 Barb. (N. Y.) 681.

[3] Bingham *v.* Cabot, 3 Dall. 19.

[4] United States *v.* Acosta, 1 How. (U. S.) 24.

[5] United States *v.* Mitchell, 3 Wash. (U. S.) 95.

[6] New Orleans, &c., R. R. Co. *v.* Lea, 12 La. Ann. 388.

[7] Tucker *v.* Burris, 12 La. Ann. 871.

[8] Hallowell, &c., Bank *v.* Hamlin, 14 Mass. 178.

be a member of such society is not legal evidence of the fact.[1] So in an action to recover for work done in building a highway, in which it is material to prove that the work was done in good faith, a certificate delivered by the chairman of the county commissioners to the plaintiff, that the highway had been graded and worked to their acceptance, is incompetent.[2] An unsworn certificate by an engineer, to a paper purporting to be a copy of estimates made by his predecessor in office, of the number of feet in certain railroad bridges, is not admissible in an action upon the contract to recover the price for building such bridges.[3] In New Hampshire, a surveyor's return of his doings, upon a warrant for the collection of highway taxes, is held not to be competent evidence to be offered to a jury to prove the facts stated in his return, the statute not making his warrant a returnable process.[4] But the certificate of the proper recording officer is competent evidence of the fact that an instrument to which it is attached has been recorded as therein certified.[5] A collector of taxes is a public officer to whose official acts credit should be given; his duplicate, and an entry made therein by him of the payment of a tax, is good evidence of the fact of payment, independent of the oath of the collector himself.[6] So a certificate of one who officiated as mid-wife at the birth of one whose minority is in issue, is relevant; and if the parties agree to waive the oath and cross-examination, it is also competent evidence, when connected with other evidence to the same point.[7] In South Carolina, the sufficiency of the security furnished by a guardian appointed out of the State must be proved by the examination of witnesses; and the certificate of the officer by whom the guardian was appointed is not sufficient.[8] In Virginia, an auditor's certificate of forfeiture of land for non-payment of taxes, being a

[1] Oakes *v.* Hill, 14 Pick. (Mass.) 442.

[2] Reed *v.* Scituate, 7 Allen (Mass.), 141.

[3] Langford *v.* Sanger, 35 Mo. 133.

[4] Davis *v.* Clements, 2 N. H. 390.

[5] Ferguson *v.* Clifford, 37 N. H. 86.

[6] Lewisburg *v.* Augusta, 2 W. & S. (Penn.) 65.

[7] Beates *v.* Retallick, 23 Penn. St. 288.

[8] Exp. Copeland, Rice Ch. (S. C.) 69.

paper which he is authorized by law to make, and being made in the customary form, proves itself.[1] A genealogical table, certified under the seal of a foreign officer, is not evidence.[2] A letter from the land commissioner, stating that certain entries are good, and others bad, is not evidence of anything, except the commissioner's private opinion, and is inadmissible.[3] So a letter of the State auditor in reference to matters of banking, etc., is not of itself evidence; that officer is required to keep a seal, and his official writings, etc., can only be properly authenticated by the use of it.[4] In Indiana, under a statute which provided that the sworn certificate of a corporation clerk to an extract of the records, should be admissible, it was held that the statute referred only to the admissibility of the copy, not to its effect when admitted, and, therefore, if any unsworn certificate be admitted without objection, it is as effective as if sworn to.[5] The indorsement and signature of the treasurer being expressly authorized and required on county warrants, by statute, such writing is competent evidence of the fact stated or certified in such indorsements.[6] A certificate of publication, signed by the editor only, is not proof of publication.[7]

Sec. 218. Certificates by Executive Officers.

A certificate of the secretary of State, stating the practice in his office with regard to the time of affixing the seal of the State to warrants, is no evidence to show the time at which such seal was annexed;[8] nor is the certificate of the register of the treasury department, under his hand, that certain receipts, of which copies are annexed, are on file in his office, with a certificate of the secretary of the treasury, under the seal of that department, that he is the register, evidence. It must appear, not only that the officer who

[1] Usher *v.* Pride, 15 Gratt. (Va.) 190.

[2] Banert *v.* Day, 3 Wash. (U. S.) 243.

[3] Jeanes *v.* Lawler, 33 Ala. 340.

[4] Morgan County Bank *v.* People, 21 Ill. 304.

[5] Smith *v.* Indiana, &c., Railway Co., 12 Ind. 61.

[6] Clark *v.* Polk County, 19 Iowa, 248.

[7] Hay *v.* M'Kinney, 7 J. J. Mar. (Ky.) 441.

[8] Brown *v.* Galloway, Pet. (U. S. C. C.) 291.

gives the certificate has the custody of the papers, but that he is authorized by law to certify them, and the register is not so authorized. A sworn copy should be produced.[1] And although the auditor's report of a balance due from a person accountable for public money is a guide to the comptroller as to the amount to be sued for, it is not evidence, for the court, of the debt.[2] The seal of the treasury department of the United States, and the signature of the secretary, are sufficient evidence to authenticate the official acts of the secretary in a State court.[3] The certificate of the secretary of State that a certificate, required by the statute relative to the formation of corporations, has not been filed in his office, is not evidence of that fact ;[4] but a certificate of incorporation from the office of the secretary of State is admissible, although the original date has been erased by the secretary, and the true date inserted.[5] In a suit on a promissory note given in consideration of the assignment of a patent right, the defendant offered the certificate of the commissioner of patents, under his seal of office, stating that no such patent had been issued, and it was held that such evidence was inadmissible.[6] A certificate of a secretary of State, that a certain grant is not recorded in his office, is not admissible evidence in an action of trespass to try title to the land mentioned in the grant.[7] A letter of the postmaster-general was read without objection to prove defaults in executing a contract; but a certificate of the postmaster-general to rebut this, being objected to, was held not competent.[8] Nor is a note of the secretary of State appended to an act of the general assembly, as published in pamphlet form, stating that the act was published in certain papers at a given date, is not evidence of the fact.[9] On a motion by a principal

[1] Bleecker *v.* Bond, 3 Wash. 529.

[2] United States *v.* Patterson, Gilp. 44.

[3] White *v.* St. Guirons, Minor (Ala.), 331.

[4] Cross *v.* Pinckneyville Mill Co., 17 Ill. 54.

[5] Johnston *v.* Ewing, &c., University, 35 Ill. 518.

[6] Stoner *v.* Ellis, 6 Ind. 152.

[7] Ayres *v.* Stewart, 1 Overt. (Tenn.) 221.

[8] Wilkinson *v.* Jewett, 7 Leigh (Va.), 115.

[9] Allen *v.* Dunham, 1 Greene (Iowa), 89.

sheriff against his deputy, for a failure to account for a part of the revenue, the auditor's certificate of the amount of taxes is admissible evidence.[1] So the certificate of the treasurer is admissible evidence to prove the indebtedness of the collector of the State tax, although the clerk of the county commissioners gave testimony that it did not appear from their books that any tax was levied during the years that the collector was charged with taxes on the books of the treasury.[2] A constable's return of his service of an order of notice issued by a city council, under an ordinance of the city, is competent evidence, supported by his testimony that he has no doubt of its truth, although he has no recollection of the fact of service.[3] But the certificate of a sheriff, who has sold land for taxes, of his having posted a certain advertisement at a certain time and place, is inadmissible.[4]

Sec. 219. Certificates by Clerks.

The certificate of a county clerk, showing that a certain person was not a justice of the peace at the date of an acknowledgment, purporting to have been taken by him, is competent, but not conclusive evidence of such fact.[5] So the certificate of a town clerk that a claim for medical services rendered to a pauper had been presented to the board of trustees, and was by the board declared to be correct, and recommended to be paid, was held to be admissible evidence, but not decided to be sufficient.[6] A certificate of the clerk of the court is insufficient to impeach his record entry.[7] So if full proof is demanded to support a claim against an estate, the certificate of the clerk of the county court, stating that a note for the sum claimed, in favor of the claimant and against the deceased, was deposited in his office, and the *ex parte* deposition of his successor, that no such note could be found in the office after diligent search, are not sufficient to estab-

[1] Johnson *v.* Thompson, 4 Bibb (Ky.), 294.

[2] Crane *v.* State, 1 Md. 27.

[3] Hildredth *v.* Lowell, 11 Gray (Mass.), 345.

[4] Wells *v.* Burbank, 17 N. H. 393.

[5] Ross *v.* Hole, 27 Ill. 104.

[6] Fayette County *v.* Chitwood, 8 Ind. 504.

[7] Holmes *v.* Budd, 11 Iowa, 186.

lish it.[1] But the certificate of the clerk of the court of errors is evidence of the reversal of a judgment,[2] and the certificate of the clerk of the circuit is sufficient evidence that a cause was not tried at the circuit.[3] A certificate that certain persons were appointed inspectors of elections, found in the town clerk's office, proved to be in the handwriting of a former town clerk, and signed by the clerk, supervisor, and a justice of the town, and filed by a former town clerk, is admissible evidence.[4] But the certificate of a town clerk, that a person has not conveyed land, is not evidence of that fact.[5] The certificate of a town clerk, on a deed, of the time when it was received into his office, pursuant to the statute, is only *prima facie* evidence of the facts recited in the certificate, and may be contradicted by parol proof.[6]

Sec. 220. Certificates by Judicial Officers.

The certificate of a magistrate of the acknowledgment of a deed is sufficient to admit in evidence, though it is not under seal;[7] and the same is true as to a certificate of a magistrate that an oath required by law was taken, although the oath as certified varies in form from that prescribed by law.[8] The certificate of a judge of probate is not admissible to show who are the heirs of a deceased person.[9] The official certificate, or the testimony of the officer who administered the oath required by law to road viewers, is more authentic than the mere statement in the report of such viewers that they had been duly sworn.[10] In an action upon a jail bond, the certificate of the justices of the quorum, that the execution creditor was notified according to law, is conclusive evidence of that fact.[11] The certificate of a judge of probate, or of the clerk of the county court, is not competent evidence

[1] Young *v.* Mackall, 4 Md. 362.
[2] Hoy *v.* Couch, 6 Miss. 188.
[3] Wright *v.* Mungy, 6 Johns. (N Y.) 286.
[4] People *v.* Cook, 14 Barb. (N. Y.) 259.
[5] Hill *v.* Bellows, 15 Vt. 727.
[6] Bartlett *v.* Boyd, 32 Vt. 256.
[7] Fellows *v.* Pedrick, 4 Wash. (U. S.) 477.
[8] Rose *v.* Kennedy, 1 Cranch (U. S. C. C.), 29.
[9] Greenwood *v.* Spiller, 3 Ill. (2 Scam.) 502.
[10] Dollarhide *v.* Muscatine County, 1 Greene (Iowa), 158.
[11] Black *v.* Ballard, 13 Me. 230.

to show that a person is a public administrator. Those officers can only certify to the correctness of copies of records of their several courts, showing their appointment.[1] A certificate by a surrogate, of facts known to him by inspection of his office records, is not evidence. Where the certificate is made as to an official act, it seems that it is admissible, although made after the close of the officer's term of office.[2] Thus in trespass for selling property by virtue of an execution, the certificate of the justice of the peace who rendered the judgment and issued the execution was held evidence, as well for himself as for the plaintiff in the execution, though such certificate was granted after the expiration of the office of the justice.[3]

Sec. 221. Notarial Certificates.

A notarial copy of a lost note was permitted to go to the jury as a presumption, in connection with the testimony of a witness, that the paper shown to the notary was the same which had been in the witness's possession and acknowledged by one of the defendants.[4] A copy of the manifest of the cargo taken in at Havana, and certified without a seal by a notary, with a certificate, signed by three notaries, that full faith and credit ought to be given to the acts of their associate, was not permitted to be read in evidence, because it did not appear that the notary had charge of these papers, and authority to authenticate them.[5] A notarial seal, applied as required by the law of the place where it is affixed, proves itself, and is sufficient evidence of the official character of the notary using it.[6] In a chancery attachment against a British bankrupt, a notarial copy of the commissioner's proceedings, is evidence.[7] The characters "N. P." following the name of a person signing the certificate of an

[1] Littleton *v.* Christy, 11 Mo. 390.

[2] Armstrong *v.* Boylan, 4 N. J. L. 76.

[3] Maynard *v.* Thompson, 8 Wend. (N. Y.) 393.

[4] Peabody *v.* Denton, 2 Gall. (U. S.) 351.

[5] Talcott *v.* Delaware Ins. Co., 2 Wash. 449.

[6] Orr *v.* Lacy, 4 McLean, 243.

[7] Wilson *v.* Stewart, 1 Cranch (U. S. C. C.), 128.

oath, clearly indicate the office of notary public.[1] In Indiana, the certificate of a notary, authorized by the laws of his own State to administer oaths, is by statute made presumptive evidence.[2] In Kentucky, a notarial certificate of a man being a citizen of the United States, such as is usually obtained by persons going abroad, is not evidence of his having made preparations to leave the country.[3] And in an action to recover the consideration paid for a United States treasury note which has been refused payment, the notarial protest is not evidence of the reasons for such refusal by the treasurer;[4] and generally, notarial certificates of facts happening in the State, have not been admitted as evidence, unless they relate to bills of exchange or protests in relation to ships and vessels; and in the latter case they are never considered as evidence, except in contradiction to evidence given in regular form by the party making the protest.[5] The record of a deceased notary is admissible for the consideration of the jury, in order to prove a notice, although the entry is doubtful as to the meaning. But a clerk of the notary cannot be allowed to explain what the notary meant by the entry.[6] Thus, the notarial certificate of a deceased notary, purporting on its face to be made out and signed several months after the protest of the note, is admissible in evidence, even though it be proved that such notarial certificate was the only record ever kept by the notary of his acts in the premises.[7] Where a notary public protested a note for non-payment, having at the time no interest therein, and he afterward became the holder of the note, it was held, in an action on the note after his decease, by his executor, against an indorser, that the certificate of the notary was competent evidence for the plaintiff.[8]

[1] Rowley *v.* Berrian, 12 Ill. 198.

[2] Andrews *v.* Ohio, &c., R. R. Co., 14 Ind. 169.

[3] Foster *v.* Davis, 1 Litt. (Ky.) 71.

[4] Moore *v.* Worthington, 2 Duv. (Ky.) 307.

[5] Welsh *v.* Barrett, 15 Mass. 380.

[6] Duncan *v.* Watson, 10 Miss. 121.

[7] Booth *v.* Watson, 13 Miss. 295.

[8] McKnight *v.* Lewis, 5 Barb. (N. Y.) 681.

Sec. 222. Marine Protests and Surveys.

The protest of one of the sailors of a captured vessel, made after his return to the United States at the first port, and left with the brokers of the insurers to fix the period from which the loss was to be paid, may be given in evidence for that purpose, but it is not evidence of any fact contained in it.[1] So the protest of some of the crew, taken abroad, may be read to invalidate their evidence under a commission.[2] But the protest of the master of a vessel is a mere narration of the bad weather he has met with, and cannot be received as evidence for himself or his owners.[3] But the captain's certificate, that wages were due, though the vessel was in port, not earning freight, is sufficient evidence thereof, though the articles were not produced.[4] The protest of a master of a vessel is not evidence, *per se;* it can only be used, in a court governed by the rules of the common law, to impeach the testimony of the master himself, or as incidentally corroborative of the log-book.[5] An alleged copy of a survey not made by order of a court of admiralty, there being no evidence that the surveyors acted under the sanction of an oath, is not admissible in evidence, although stamped by the American consul of the port of survey.[6] But the certificate of a marine surveyor and inspector, made in the course of his business, is competent evidence of the seaworthiness of a vessel at that time, if supported by his oath that he examined the vessel, and that he has no doubt that the facts stated in it are true, although he has no independent recollection of those facts.[7] A surveyor's report, however, upon a damaged vessel, stating his opinion concerning the repairs necessary to be made, and an estimate of their cost, is not admissible in evidence in an action against the insurers, where the only evidence to corroborate such report

[1] Ruan *v.* Gardner, 1 Wash. (U. S.) 145.

[2] Winthrop *v.* Union Ins. Co., 2 Wash. 7.

[3] The May Queen, 1 Newb. Adm. 464.

[4] Minors *v.* The Mary, Bee, 119.

[5] Straffin *v.* Newell, T. P. Charlt. (Ga.) 172; Lamalere *v.* Caze, 1 Wash. (U. S.) 413; Hempstead *v.* Bird, 1 Day (Conn.), 89.

[6] Stephenson *v.* Piscataqua Fire, &c., Ins. Co., 54 Me. 55.

[7] Perkins *v.* Augusta, Ins., &c. Co., 10 Gray (Mass.), 312.

is the testimony of the surveyor himself that the condition of the ship appeared fully in the report.[1] A protest is not evidence to show that a captain is not chargeable with the loss of cargo.[2]

Sec. 223. Consular Certificates.

The certificate of the American consul at a foreign port, under his seal of office, that the ship's papers were lodged with him, agreeably to the requisitions of the embargo law, is good evidence of that fact, but not of other facts stated in it.[3] Indeed, the rule may be said to be invariable, that the certificate of any officer, is only good as evidence, as to such matters and facts as he is by law required to keep a record or give a certificate of. His certificate is not evidence of acts which are not official nor within his personal knowledge, but such a certificate is competent to remit a penalty due the United States.[4] An American consul at a foreign port is without authority to make an authenticated copy of a draft drawn here, by the owner of a ship, upon the consignees of such ship at such foreign port,[5] and his certificate of the death of an individual abroad is not sufficient proof of that fact.[6]

Sec. 224. Certificates by Appraisers, Inspectors, Etc.

Where personal property was leased to the defendant, a written appraisal of the whole of it by persons appointed to appraise a portion of it, is not admissible evidence in an action against him, though it was agreed between the parties that the whole should be appraised;[7] but when such a certificate is admissible as evidence of a fact stated in it, the person making it cannot contradict it. Thus, it has been held not competent for a surveyor of lumber, whose survey has been returned and recorded as provided in the statute

[1] Howard *v.* Orient, &c., Ins. Co., 2 Robt. (N. Y.) 539.

[2] Cunningham *v.* Butler, 2 Hayw. (N. C.) 392.

[3] United States *v.* Mitchell, 2 Wash. (U. S.) 478.

[4] Brown *v.* The Independence Crabbe (U. S.), 54.

[5] Williams *v.* Crescent, &c. Ins., Co., 15 La. Ann. 651.

[6] Morton *v.* Barrett, 19 Me. 109.

[7] Great Pond Co. *v.* Buzzell, 39 Me. 173.

regulating the survey of lumber, to show, by his testimony, that the lumber surveyed by him was of a different quality from that stated in his survey.[1]

Inventories of the estates of persons deceased are admissible as *prima facie* evidence, for or against strangers, for many purposes; being made by persons appointed under authority of law, to investigate a matter of fact of general interest, under oath, and to make a return or report upon the subject, to be preserved of record.[2]

The official certificate or stamp of a government inspector, is not conclusive evidence that the article stamped is of the quality denoted by the stamp; it may be shown to be of a different quality.[3] But when the statute declares that the certificate of a certain officer shall be evidence of certain facts, parol evidence is inadmissible, both under the statute and on general principles.[4]

When, from the omission of the signature or any other cause, the authenticity of an alleged certificate of a certain officer is not manifest and clear, it becomes a question of fact to be found like any other.[5]

Sec. 225. Certificates by Land Officers.

A certificate from the land office of the United States is to be taken as genuine, and what it purports to be, until the contrary appears.[6] But the certificate of a land officer cannot be evidence of any fact unless expressly made so by statute of the State or of congress.[7] The certificate of the register of the United States land office is competent evidence to show title in land, and needs no authentication.[8] And the same is true as to a certificate of the surveyor-general going to show that a wrong name was inserted in a State grant.[9] Indeed the official certificate of the register of a

[1] Whitman *v.* Freese, 23 Me. 212.
[2] Seavey *v.* Seavey, 37 N. H. 125.
[3] Clintsman *v.* Northrop, 8 Cow. (N. Y.) 45.
[4] Hammondsport & Bath Plank Road Co. *v.* Brundage, 13 How. Pr. (N. Y.) 448.
[5] Brink *v.* Spaulding, 41 Vt. 96.
[6] Cox *v.* Jones, 1 Stew. (Ala.) 379.
[7] Mayo *v.* Johnson, 4 Ark. 613.
[8] Floyd *v.* Ricks, 14 Ark. 286.
[9] Brooking *v.* Dearmond, 27 Ga. 58.

land office to any act on record in his office is competent evidence of that fact.[1] And the certificate of a register and receiver of any land office in the United States to any fact or matter of record in his office, is competent evidence to prove such fact.[2] The recorder's certificate is competent evidence to show who entered land in dispute.[3] A certificate of a register of deeds that he had examined the records of his office and found on record a plat of a part of a certain city, and that there was no other plat on file or of record relating to said city that he could find, is inadmissible. In general, a certificate of mere matter of fact not coupled with any matter of law is not receivable in evidence.[4] If, however, lands are stricken off to the commonwealth for nonpayment of taxes, and redeemed by their payment within the time limited by law, the register's receipt is competent to prove the redemption.[5] In an action to enforce a judicial mortgage, the certificate of the recorder that the judgment has been recorded in his office, has the same effect as evidence when drawn up on a duly certified copy of the judgment as it would have on a separate and distinct paper; but the recorder's certificate is only *prima facie* evidence of the facts stated in it, and if untrue may be contradicted by proof.[6] In an action for damages occasioned by a mill-dam, to land held under the pre-emption law, the certificate of the register of the land office in which the land lies is admissible to prove the filing of the declaratory statement upon the land in question;[7] but the certificate of the register of the land office that a map is a correct representation of a part of a township, is not sufficient to make it evidence under a statute making copies of records evidence; it should certify that it is a true copy of the original, and that the original is of record in the office.[8] A certificate of the right of preemption is *prima facie* evidence of the title against a New

[1] Ross *v.* Reddick, 2 Ill. 73.
[2] Delanney *v.* Burnett, 9 Ill. 454.
[3] York *v.* Sheldon, 18 Iowa, 569.
[4] Bemis *v.* Becker, 1 Kan. 226.
[5] Taylor *v.* Steele, 1 A. K. Marsh. (Ky.) 315.
[6] Taylor *v.* Pearce, 15 La. Ann. 564.
[7] Dorman *v.* Ames, 12 Minn. 451.
[8] Doe *v.* King, 4 Miss. (3 How.) 125.

Madrid certificate and survey,[1] and a certificate of the secretary of the land office, authenticating an entry which he is not authorized by statute to authenticate, is not admissible in evidence.[2] So a certificate of the secretary of the land office that he had searched for a certain warrant and could not find it, is admissible in evidence.[3] That there has been a conveyance between two parties or that a deed purporting to convey has been filed at his office, cannot be proved by the certificate of the commissioner of the general land office.[4]

Sec. 226. Surveys of Land.

A copy of a warrant of survey, under the surveyor-general's hand, and containing his directions to the deputy sheriff to make the survey, is admissible in evidence,[5] and the official certificate of survey, returned by a legal sworn surveyor, in Virginia, cannot be invalidated by a particular fact, tending to show an impossibility that the survey could have been made in the time intervening between the date of the entry and the date of the certificate of survey.[6] But the fact that a copy of a certificate of survey was delivered by the Spanish authorities of New Orleans, in 1803, to a person applying for documentary proofs of title to the land, does not prevent the authenticity of the certificate from being impeached.[7] The certificate of a county surveyor is no evidence of possession, except where the route of a watercourse making the boundary of a tract of land is so changed as to leave the tract or part of it on the opposite side from that on which it was at the time of the survey, and the surveyor is called on to make an accurate survey of the part of the tract cut off.[8] The certificate of the deputy surveyor of the county where land lies, is *prima facie* evidence that a survey was made at the time it purports to have been made.[9] A sur-

[1] Rector *v.* Welch, 1 Mo. 334.

[2] Garwood *v.* Dennis, 4 Binn. (Penn.) 314.

[3] Weidman *v.* Kohr, 4 S. & R. (Penn.) 174.

[4] Smithwick *v.* Andrews, 24 Tex. 488.

[5] Hewes *v.* M'Dowell, 1 Dall. (U. S.) 5.

[6] Pollard *v.* Dwight, 4 Cranch (U. S.), 421.

[7] United States *v.* King, 3 How. (U. S.) 773.

[8] Dillon *v.* Mattox, 21 Ga. 113.

[9] Hoy *v.* M'Murry, 1 Litt. (Ky.) 364.

veyor's report is evidence of the present existence of objects found upon the land; but it may be impeached or falsified by other evidence. A coincidence between the objects mentioned in a grant or deed, and those reported by the surveyor, may be satisfactory evidence of the boundary of the land in dispute.[1] Where a surveyor's report is to be substantive evidence, in a suit in ejectment, all the defendants who are of full age ought to have notice of the time of making it; and a temporary absence of one defendant will not excuse the want of notice.[2] A surveyor's certificate, on the recital of its contents in a patent, cannot be contradicted by parol evidence; evidence, even by the surveyor himself, to show that the survey was never made, or was made at a different time, is inadmissible.[3] Notes or memoranda of a surveyor who is dead, indorsed on his certificate of survey, are, on proof of his handwriting, competent evidence to show the original running of the land to which they relate, but not to elongate, or shorten, or in any manner to affect the position of the land as described in the grant.[4] Where, in a suit for the recovery of lands, a survey of the premises was ordered, and the surveyor's certificate was objected to as not identifying the lands surveyed with those sued for, it was held that a general description in the certificate of the bounds of the whole, which was specific enough to enable witnesses to identify the land, was sufficient to make the certificate admissible in evidence.[5] A survey in which there is a clerical error is good evidence. So, also, is a deed, signed by a part of the grantors, and not recorded;[6] but a copy of a survey, not returned nor verified by the surveyor, cannot be read in evidence;[7] nor is a plat of a survey, found among the papers of an assistant, not signed nor returned by the deputy surveyor.[8] A survey is admissible though it does not recite

[1] Heffington *v.* White, 1 Bibb (Ky.), 115.

[2] Ewing *v.* Savary, 3 Bibb (Ky.), 235.

[3] Cain *v.* Flynn, 4 Dana (Ky.), 499.

[4] Snavely *v.* M'Pherson, 5 H. & J. (Md.) 150.

[5] Spears *v.* Burton, 31 Miss. 547.

[6] Brown *v.* Long, 1 Yeates (Penn.), 162.

[7] Davis *v.* White, 3 Yeates (Penn.), 587.

[8] M'Kenzie *v.* Crow, 4 Yeates (Penn.), 428.

the authority by which it is made ;[1] and the field-notes of a deputy surveyor, showing a survey for A. at a particular time ; a warrant in B.'s name calling for A., as adjoining ; and an old draft of a survey, found in the surveyor's office, indorsed in his handwriting, were admitted in evidence to support a title.[2] A return of survey into the surveyor-general's office, and a lapse of twenty years afterward without any attempt made during that time to take exception or objection to it, is conclusive evidence that it was regularly made.[3]

Sec. 227. United States Departmental Records.

The acts of congress, making transcripts from the departments at Washington evidence against public debtors, though in derogation of the common law, are valid, and the transcripts *prima facie* proof ; but the mode prescribed by law for authenticating them must be strictly pursued.[4] Certified transcripts of the accounts kept at the treasury department, are made evidence of the facts entered and the balance due, in actions between the government and its officers and their sureties.[5] The provision of an act of congress, declaring that all copies of bonds, contracts or other papers, relating to or connected with the settlement of any account between the United States and an individual, when certified by the register to be true copies of the originals on file, and authenticated under the seal of the treasury department, shall have equal validity and be entitled to equal credit with the originals, is not restricted to cases where suits are commenced under the authority given by section 1 of the act, but applies to all cases where the evidence is required.[6] The third auditor is not authorized to authenticate copies of

[1] Sproul *v.* Plumstead, 4 Binn. (Penn.) 189.

[2] Boyle *v.* Johnston, 6 Binn. (Penn.) 125.

[3] Nieman *v.* Ward, 1 Watts & S. (Penn.) 68.

[4] United States *v.* Harrill, 1 McAll. (U. S. C. C.) 243; Gilman *v.* Riopelle, 18 Mich. 145; Crowell *v.* Hopkinton, 45 N. H. 9.

[5] Walton *v.* United States, 9 Wheat. (U. S.) 651 ; Bruce *v.* United States, 17 How. (U. S.) 437 ; United States *v.* Patterson, Gilp. (U. S. C. C.) 44 ; Postmaster-Gen. *v.* Rice, id. 554.

[6] United States *v.* Lent, 1 Paine (U. S. C. C.), 417.

bonds and other papers. His power, under the statute, extends only to "transcripts from the books and proceedings of the treasury in regard to the accounts of the war department." Copies of bonds must still be certified by the register, and authenticated under the seal of the department.[1]

Sec. 228. Land Office Records and Papers.

A transcript from the books or papers on file in the general land office, or to the Indian bureau of the department of the interior, if properly certified, under the seal of the department, by the "acting commissioner," is admissible in evidence.[2] So the surveyor-general's certificate that a copy of a decree of confirmation, by the United States board of land commissioners, is a correct copy thereof, "as the same is on file," etc., is sufficient to admit the copy in evidence in a suit in ejectment.[3] A certified copy of a patent for lands issued by the United States is admissible in evidence on common-law principles. Acts of public officers in the execution of the laws, who are required to make and keep public records of their surveys, sales and conveyances, may be shown by the public records kept and made according to law, or by copies thereof, duly certified by the proper officer under the seal of his office.[4]

So sworn copies of affidavits on file in the office of the register of a land office, respecting a pre-exemption right, are admissible as evidence in cases in which the originals, could they be procured, would be evidence.[5] A letter of the commissioner of the land office, affecting the title to lands, entered from the United States government, may be proved by an authenticated copy.[6] The exemplification of a patent certified by the commissioner of the general land office, is admissible in evidence without proof of the loss of the original.[7]

[1] United States *v.* Griffith, 2 Cranch (U. S. C. C.), 366; Wickliff *v.* Hill, 3 Litt. (Ky.) 330.

[2] Stephens *v.* Westwood, 25 Ala. 716.

[3] Young *v.* Emerson, 18 Cal. 416; Clark *v.* Hammerle, 36 Mo. 620.

[4] Lane *v.* Bommelmann, 17 Ill. 95.

[5] Smith *v.* Mosier, 5 Blackf. (Ind.) 51.

[6] Davis *v.* Freeland, 32 Miss. 645.

[7] Barton *v.* Murrain, 27 Mo. 235.

The report of the surveyor-general to the commissioner of the general land office, detailing the history of his operations in making a survey, is inadmissible in evidence to prove the location of the land surveyed.[1] So an exemplification of any record or paper required by law to be filed in the land office, is, as evidence, of equal authority with the original.[2]

Sec. 229. Custom-house Records.

A copy of a manifest, recorded at a custom-house, and examined, is good evidence.[3] So a copy of a clearance at another port in the United States, properly certified by the deputy collector under seal as a true copy of the original, is competent evidence to establish the date of the clearance, when accompanied by testimony that the person certifying was at the time acting deputy collector, that his signature was genuine, that the seal was the custom-house seal, and that the original had been on file in the custom-house of the port for which the vessel cleared, but could not be found after due search.[4]

The enrollment of a steamboat is a record, of which the collector of customs is the custodian, under the acts of congress, and a copy thereof, duly certified by the collector, is competent evidence; as is also such a copy of the act of sale recorded under the act of congress of 1850.[5] A copy of any enrollment, certified to be such by the collector, is not admissible evidence, he not being authorized to grant copies generally.[6]

Sec. 230. State Land Office Papers.

A paper, purporting to be "a certified extract from the general draft of certain districts, as framed and approved by the surveyor-general, remaining in his office," under the seal of the office, is not evidence; it being only an extract, and

[1] Clark *v.* Hammerle, 36 Mo. 620.

[2] Lee *v.* Getty, 26 Ill. 76; Harris *v.* Dove, 4 Blackf. (Ind.) 369; Smith *v.* Mosier, 5 id. 51; Stephenson *v.* Doe, 8 id. 508; Harden *v.* Ho-yo-po-nubby, 27 Miss. 567.

[3] United States *v.* Johns, 4 Dall. (U. S.) 412.

[4] White *v.* Kearney, 2 La. Ann. 639.

[5] Sampson *v.* Noble, 14 La. Ann. 347.

[6] Dyer *v.* Snow, 47 Me. 254.

not being a copy of an office paper ;[1] nor can an affidavit made in connection with a warrant of survey, and certified as an office paper in the land office, be given in evidence ;[2] nor is the certificate of the register of the land office, appended to a transcript from the books of his office, that the same is a true copy, of itself testimony before the jury ; the scope of the certificate being merely to make the copies of the entries evidence.[3] But generally, duly authenticated copies from the State land office are admissible.[4] A deed of a grantee of the State cannot be considered as belonging to the archives of the State, so as to be proved by a copy made by the land agent.[5] A copy of a certificate of entry by a register will not be received in evidence where it appears that the original is on the files in the general land office ;[6] and where a certified copy of the original certificate and survey from the land office were offered in evidence to give color to title, the copy was rejected because the certificate was not accompanied by evidence of its having been recommended as genuine.[7] A *hipotica especial* (a security in the nature of a mortgage) and its transfer, are not papers pertaining to the records of the general land office, nor archives of the office, and therefore copies of them certified by the commissioner of the land office are inadmissible in evidence.[8]

Sec. 231. State Grants.

Certified copies of the surveyor-general's grants are inadmissible, unless a sufficient basis be laid for their introduction.[9] In North Carolina, patents or grants from the State, being recorded in the office of the secretary of State, copies

[1] Griffith *v.* Tunckhouser, Pet. (U. S. C. C.) 418.

[2] Lanning *v.* Dolph, 4 Wash. 624.

[3] Johnson *v.* Mays, 8 Ark. 386.

[4] Franklin *v.* Woodland, 14 La. Ann. 188; Finley *v.* Woodruff, 8 Ark. 328; Sessions *v.* Reynolds, 15 Miss. 130; Wray *v.* Ho-ya-pa-nubby, 18 Miss. 452; Harper *v.* Farmers, &c., Bank, 7 W. & S. (Penn.) 204; Oliphant *v.* Ferren, 1 Watts (Penn.), 57; Grant *v.* Levan, 4 Penn. St. 393; Houston *v.* Perry, 3 Tex. 390; Mason *v.* McLaughlin, 16 Tex. 24; Dikes *v.* Miller, 25 Tex. Supp. 281; Pollard v. Lively, 4 Gratt. (Va.) 73; Ward *v.* Moorey, 1 Wash. T. 122.

[5] Hammatt *v.* Emerson, 27 Me. 308.

[6] Doe *v.* M'Caleb, 3 Miss. 756.

[7] Ryan *v.* Jackson, 11 Tex. 391.

[8] Mapes *v.* Leal, 27 Tex. 345.

[9] Hensley *v.* Tarpey, 7 Cal. 288.

of them, obtained from that office, may be given in evidence without accounting for the originals, by all persons except the patentees or grantees themselves, or those claiming under them, who would be entitled to the possession of the originals.[1] A copy of a grant from the register's office, and one from the office of the secretary of State, are both secondary evidence; and where secondary evidence is admissible, it is no objection to the copy from the register's office that one from the office of the secretary would be better evidence.[2] Generally, it may be said that a copy of a grant is not admissible in evidence, without first accounting for the nonproduction of the original.[3] Office copies of grants, certified by the secretary of State and surveyor-general or other deputies, are made admissible in evidence, in South Carolina, by statute.[4] Where the commissioner of the general land office gave a certified copy of a grant, under which the plaintiff claimed, and annexed to it what purported to be a release by the original grantee to the government, of the genuineness of which release there was no proof, it was held that the plaintiff was not bound to read such release with the rest of the document.[5]

Sec. 232. State Records.

A certificate from the executive department is admissible in evidence if it gives substantially the contents, or a part of the contents, of the thing to which it relates. It is not necessary that it should give a copy of the thing to which it relates.[6] A transcript from the books of the treasurer of the State is competent evidence to show that a State tax has been paid.[7] In Ohio, by statute, certified copies of the files of the auditor of State are made evidence, but it is held that

[1] Candler *v.* Lunsford, 4 D. & B. L. (N. C.) 407.

[2] Osborne *v.* Ballew, 7 Ired. L. (N. C.) 415.

[3] Malcolmson *v.* M'Kee, 1 Brev. (S. C.) 168.

[4] Maxwell *v.* Carlile, 1 McCord (S. C.), 534; Rochell *v.* Holmes, 2 Bay (S. C.), 487; Gourdine *v.* Barino, Harp. (S. C.) 221; S. P. Linning *v.* Crawford, 2 Bailey (S. C.), 296.

[5] Dikes *v.* Miller, 11 Tex. 98.

[6] Henderson *v.* Hackney, 16 Ga. 521.

[7] Hodgdon *v.* Wight, 36 Me. 326.

this authorizes their admission only when the originals would be evidence.[1]

In an action by a sub-contractor against a contractor, to recover for work done on the public works, sworn copies of estimates from the office of the resident engineer are competent evidence.[2] So a certified copy of a contract for constructing a section of the Pennsylvania canal, from the auditor's office, is admissible without the subscribing witnesses.[3] A certified copy of the executive minutes, is not evidence of a witness's pardon. The pardon or a certified copy is necessary.[4]

Sec. 233. Verdicts.

A verdict upon which no judgment has been rendered is not admissible in evidence,[5] nor is one which has been set aside for any cause.[6] Of course verdicts are only binding upon parties and their privies,[7] but as between them, after judgment thereon, they are conclusive in any subsequent suit involving the same subject-matter.[8] By special agreement between the parties to several suits involving the same questions, a verdict in one action may conclude all, as when several underwriters against whom separate actions were brought for the same loss, agreed to abide by the verdict in one, it was held that the verdict in that action was admissible as evidence in the others.[9]

Sec. 234. Judgments.

The proceedings of a court of record can only be proved by the record itself, certified by the clerk under the seal of the court.[10] But when there is not a plea of *nul tiel record*,

[1] State *v.* Wells, 11 Ohio, 261.

[2] Lyon *v.* McCadden, 15 Ohio, 551.

[3] McCoy *v.* Lightner, 2 Watts (Penn.), 347.

[4] Cox *v.* Cox, 26 Penn. St. 375.

[5] Donaldson *v.* Jude, 2 Bibb. (Ky.) 57; Hinckle *v.* Carruth, Tread. (S. C.) 471; United States *v.* Addison, 6 Wall. (U. S.) 291.

[6] Mahoney *v.* Ashton, 4 H. & M. (Md.) 295.

[7] Davis *v.* Wood, 1 Wheat. (U. S.) 6.

[8] Preston *v.* Hanney, 2 H. & M. (Va.) 55.

[9] Patton *v.* Caldwell, 1 Dall. (U. S.) 419.

[10] Kelly *v.* Morray, L. R., 1 C. P. 158; Comyns' Dig., Record (A) (B); Kemp *v.* Neville, 10 C. B., N. S. 523.

but the record becomes material to prove some allegation in the pleadings, or upon some collateral issue, it may be proved either by the production of the record when complete, by an exemplification or by an examined or other authenticated copy. In England, formerly, records of judgments of the superior courts at Westminster, etc., were not complete until entered on parchment and enrolled;[1] and a copy of a judgment in paper, signed by the master, was not evidence of the judgment, for it had not yet become permanent;[2] though such entry was sufficient to warrant execution. In one case,[3] the issue roll, not under the seal of the court, with a *nolle pros.* entered thereon against a co-defendant, was held insufficient proof of the *nolle pros.* It would seem that a regular entry on record was necessary. *But where the pleadings did not allege any matter of record*, but only averred the pendency of a judicial proceeding before the record is made up—as that a trial was had—the fact might be proved by the production of the nisi prius record, or indictment, which are the official minutes; and, in some cases, perhaps, by mere oral evidence.[4]

It has been held that the minute-book of the clerk of the peace is not enough to prove that an indictment was preferred; nor is the original indictment itself, though indorsed as a true bill;[5] yet in both these cases, the allegation of the indictment was only introductory to the gist of the proceeding, which was a conspiracy to keep back a witness in one case, and an action on an agreement, after indictment found, in the other. Nor is the minute-book in which the proceedings at sessions are entered, and from which the record is made up, evidence of the names of the justices in attendance at the trial of it.[6] Where the record alleges an adjournment by A. and others, parol evidence may be given as to the justices actually present. The minutes of proceedings are evi-

[1] B. N. P. 228; Glynn *v.* Thorpe, 1 B. & A. 153.

[2] B. N. P. 228.

[3] Fagan *v.* Dawson, 4 M. & G. 711.

[4] Pitton *v.* Walter, 1 Stra. 162; R. *v.* Browne, M. & M. 315; R. *v.* Newman, 2 Den. C. C. 390.

[5] R. *v.* Smith, 8 B. & C. 341; Porter *v.* Cooper, 1 C. M. & R. 388.

[6] R. *v.* Bellamy, Ry. & M. 171.

dence of them on a trial before the same court sitting under the same commission.[1] An allegation that an appeal came on to be heard at the sessions must be proved by the production of the record regularly made up in parchment;[2] but where (as is usually the case) no record but the minute-book is kept by the sessions, such book was admitted in evidence.[3]

In an action upon a judgment, any variance between the judgment described in the declaration from that of the record will exclude the record from being received as evidence.[4] In a Missouri case, the declaration alleged that the plaintiff recovered his debt, $1,000, and his damages, $32.19, and his costs, and averred that his costs amounted to $13.90, and concluded with a *pro ut patet recordum*. The plea was *nul tiel record*. A record was offered in evidence, showing the amount of the debt and damages, without showing the amount of the costs. Below the certificate of the clerk and the seal of the court was a taxation of costs, amounting to the sums averred in the declaration. The record was rejected on the ground of variance. The same record, when offered in evidence for the recovery of the debt and damages, without costs, was also rejected.[5] Thus, where the declaration described a judgment recovered at ——, in the county of Richmond, in the State of New York, by and before the supreme court of judicature for said county and State, the exemplification produced was a judgment rendered by the supreme court of judicature of the people of the State of New York, at the city of Albany, it was held that the record offered in evidence was not admissible under the plea of *nul tiel record*.[6]

Where the plaintiff was enjoined from collecting the amount of a judgment recovered by him, and execution was afterward issued thereon, under which land of the defendant was sold in an action by the purchaser to recover possession, the record of the judgment is admissible in evidence

[1] R. *v.* Tooke, cited 8 B. & C. 343; R. *v.* Newman, *supra*.

[2] R. *v.* Ward, 6 C. & P. 366; Accord. Giles *v.* Siney, *infra*.

[3] R. *v.* Yeoveley, 8 Ad. & El. 806.

[4] Suydam *v.* Aldrich, 3 McLean (U. S.), 383.

[5] Wash *v.* Foster, 3 Mo. 205.

[6] Pearsall *v.* Phelps, 3 Ala. 525.

without first producing the sheriff's deed, the decree dissolving the injunction and the injunction bond.[1] If an entry of record does not show when it was made, a judgment *nunc pro tunc*, ascertaining the date, cannot be contradicted by showing the dates of preceding and succeeding entries.[2] Judgments and the proceedings in the causes in which they were rendered can only be proved by the production of the record itself, or by a certified or examined copy, by the clerk of the court. They are not sufficiently verified by the oath of a witness that he was at one time clerk of the court, and that certain papers exhibited to him as records of the court, were issued and filed by him when he was clerk of the court, and are in his handwriting and that of his deputies, and he believes they are the records of the court; and of another witness, that he received the records from the clerk of the court as the records of the suits to which they relate.[3] Where the records have been destroyed except the judgment-book, parol evidence of the pleadings, etc., is not admissible without a certified copy of the judgment.[4] When all the necessary papers to constitute the judgment-roll in a foreclosure action existed, but were never attached together in the form of a roll, it was held that they were admissible in evidence in support of a title to property acquired under a sale thereof as directed by the judgment therein.[5] Evidence is admissible to show the particular day on which a judgment was rendered, when the record is of a term generally, and the particular day becomes material to the rights of parties.[6] A transcript of the record of a replevin suit without the date of the writ, is conclusive evidence of the right of property of the plaintiff, at the date of judgment only.[7]

The plaintiff, in an action on a judgment, offered in evidence a writ and declaration returnable to a justice of the peace, with regular service indorsed thereon, and the following minutes in the handwriting of the justice, viz.: "Court

[1] Bumpass *v.* Webb, 3 Ala. 109.
[2] Eslava *v.* Elliott, 5 Ala. 264.
[3] Lyon *v.* Bolling, 14 Ala. 753.
[4] Nims *v.* Johnson, 7 Cal. 110.
[5] Sharp *v.* Lumley, 34 Cal. 611.
[6] Young *v.* Renyon, 2 Day (Conn.), 252.
[7] Sexton *v.* Brock, 15 Ark. 345.

fees paid. Plea, general issue, *non assumpsit*, and issue. Continued 26th September, 1836. Damages, $5.75. Court 50 cts. Attendance, $1" (and other items of a bill of costs, amounting to $4.23); and also an execution counting on a judgment between the parties to the writ, recovered before the same justice, for the same sums of debt and costs, and signed by the justice, with a return of *non est inventus* thereon. It appeared that the justice died in July, 1837. It was held that these writings did not constitute or show a record of a judgment rendered; and that, there being no proof of a record once existing and lost, they were not admissible as a legal substitute for such proof.[1] In Maine, in a suit upon a judgment recovered before a justice of the peace, the plaintiff is bound to establish the existence of the record; and for that purpose it is not sufficient to introduce a book alleged to contain the record, without some proof of its authenticity.[2] In Indiana, a judgment of a justice of the peace should be signed, in order to be admissible in evidence.[3] In Missouri, it may be proved by parol that the transcript of a judgment, obtained before a justice of the peace, was filed in the county court, and that the county court allowed the amount of the judgment so filed. The records of the county court reciting the transcript may be read without producing the transcript.[4] A record imports absolute verity, and must be tried by itself. It must be complete and perfect in itself without reference to extraneous circumstances. If deficient or imperfect, it cannot be assisted or aided by evidence *dehors* the same. So, where a record of a judgment against lands for taxes unpaid, does not state in what year or in what term it was rendered, the sheriff's deed must fall for want of a foundation to rest upon.[5] But in all cases the question as to the jurisdiction of the court

[1] Davidson *v.* Murphy, 13 Conn. 213.

[2] Wenthworth *v.* Keizer, 33 Me. 367.

[3] Ringle *v.* Weston, 23 Ind. 588.

[4] Huston *v.* Becknell, 4 Mo. 39.

[5] Young *v.* Thompson, 14 Ill. 380; Douglass *v.* McKenire, 19 Conn. 489; Galloway *v.* McKeiten, 5 Ired. L. (N. C.) 12; Farley *v.* Budd, 14 Iowa, 289; Daws *v.* McMichael, 6 Paige Ch. (N. Y.), 139; Willard *v.* Whitney, 49 Me. 235.

rendering it, may be inquired into, and if it has no jurisdiction, the judgment is a nullity, and therefore of no value as evidence.[1] A copy of the case, made by the presiding justice of the court of common pleas, and transferred to the superior court, being the case upon which the judgment in the last named court was rendered, and the foundation of the final judgment, is proper evidence to show what matters were litigated and decided in the suit.[2] Where a record of a prior judgment is competent evidence in a cause, irregularity or error in that judgment cannot be objected to or inquired into on the trial.[3] A record of conviction is not invalid because the judge who signed it received his appointment after the conviction took place.[4] The judgment-roll in a partition suit is admissible in evidence, in an action in ejectment, to show title in the plaintiff, although it was not signed and docketed until after the commencement of the action.[5] Where the date of a judgment is prior to those of the trial and verdict, it will be considered a mere clerical error, and be no objection to the admission of the judgment in evidence, in an action against the sheriff for taking insufficient sureties on the writ of replevin. A record of a judgment recited that the court entered judgment for, etc. It was held that this was as good as if it recited that it was adjudged by the court, etc., as it *prima facie* showed a judgment, which was enough, until the record was impeached.[7]

Sec. 235. Proof of Foreign Judgments, Etc.

A judgment duly verified by a seal proved to be that of a foreign court will be presumed to be regular and agreeable to the laws of the State or country where it was rendered, until the contrary is shown. The proper method of proving it is by an exemplified copy, although it may be proved by

[1] Custis *v.* Georgetown, &c., T. Co., 2 Cranch (U. S. C. C.), 81; Lincoln *v.* Lamer, 2 McLean (U. S. C. C.), 473; Wistervelt *v.* Lewis, 2 id. 473.

[2] Brackett *v.* Hoitt, 20 N. H. 257.

[3] Stothoff *v.* Dunham, 19 N. J. L. 181.

[4] Stevens *v.* People, 1 Hill (N. Y.), 261.

[5] Lynch *v.* Rome Gas Light Co., 42 Barb. (N. Y.) 591.

[6] Myers *v.* Clark, 3 W. & S. (Penn.) 535.

[7] Vilas *v.* Reynolds, 6 Wis. 214.

an examined copy, or by a certified copy, although in the latter case the certificate must be authenticated,[1] either by the certificate of the judge of the court, or by a witness who saw the clerk affix the seal of the court thereto, and attest the copy with his own name.[2] If the court has no seal, the fact may be shown.[3] If the copy is authenticated by the judge of the court, his handwriting must be proved,[4] which it has been held may be done by the certificate of a notary public.[5] The seal of the court, if it has one, *must be affixed to the record itself*, and it is not sufficient that it is annexed to the certificate of the judge of the court authenticating the attestation of the clerk who certifies the record.[6] When the record is under seal, it is evidence that the court rendering the judgment is a court of record.[7] If the final record in a cause has been made up, the original papers are not admissible as evidence.[8] But until the record has been made up, the writ, and all original papers on file in the clerk's office, are admissible in the same court.[9] The records of the same court prove themselves.[10] But upon a plea of *nul tiel record* there must be an inspection of the record, and a copy will not be allowed.[11] In Maine, it is held that either the records of inferior courts of that State, or duly authenticated copies thereof, or the original papers, are admissible as evidence.[12] The whole record should be produced, although only a part of it need be used.[13] The records of one county court brought into another court by the county clerk of that county, are admissible without further proof of their genuineness, but not if they find their way into another county and

[1] Church *v.* Hubbart, 2 Cranch (U. S.), 238.

[2] Buttrick *v.* Allen, 8 Mass. 273.

[3] Packard *v.* Hill, 7 Cow. (N. Y.) 434.

[4] Henry *v.* Adley, 1 Camp. 63.

[5] Yeaton *v.* Fry, 5 Cranch (U. S.), 335.

[6] Turner *v.* Waddington, 3 Wash. (U. S.) 126.

[7] Smith *v.* Redden, 5 Harr. (Del.) 321.

[8] Brown *v.* Isbell, 11 Ala. 1009.

[9] Peck *v.* Sand, 2 Ga. 1.

[10] Prescott *v.* Fisher, 22 Ill. 390; Harrison *v.* Kramer, 3 Iowa, 343; Kendall *v.* Talbot, 1 A. K. Mar. (Ky.) 24; Wallace *v.* Beauchamp, 15 Tex. 303.

[11] Burke *v.* Trigg, 2 Wash. (U. S.) 215.

[12] State *v.* Bartlett, 47 Me. 396.

[13] Carrick *v.* Armstrong, 2 Cold. (Tenn.) 265; Walker *v.* Doane, 108 Ill. 286; Thomas *v.* Stewart, 92 Ind. 246.

are brought into court by some other person. Judicial proceedings before a justice of the peace, in North Carolina, are held not to prove themselves, like records, but parol evidence may be introduced to show that they are void.[1] Summary and early records of the court are admissible in evidence.[2] And generally, the pendency of a suit in a court of record can only be proved by record evidence.[3] The circuit court of the United States is not a foreign tribunal, so as to require its judgments to be proven as facts, but its judgments under its seal are admissible in evidence, the seal proving itself like the seal of a State court.[4]

Sec. 236. Between what Parties Admissible.

A judgment is only conclusive upon the parties thereto, and their privies; that is, between the parties and those united with them in interest. By *privity* is meant mutual or successive relationship to the same rights of property, whether it grows out of a contract, the operation of law, or kinship.

There are five kinds of privies; privies of blood, such as the heir to the ancestor; privies in representation, as executors or administrators to the deceased; privies in estate between donor and donee, lessor and lessee; privies in respect of contract; and privies on account of estate and contract together. Thus a receiver may be called the privy of the plaintiff by representation.[5] The representatives of parties to a suit are bound by the judgment;[6] so are the heirs of such parties;[7] but not where the heirs inherited after suit brought and before decree.[8] The proceedings subsequent to the death of the party are void unless his heirs are brought in.[9]

[1] Carroll *v.* M'Gee, 3 Ired. L. (N. C.) 13.

[2] Boal *v.* King, Wright (Ohio), 223.

[3] Smiley *v.* Dewey, 17 Ohio, 156.

[4] Williams *v.* Wilkes, 14 Penn. St. 228.

[5] Tinkham *v.* Borst, 24 How. Pr. (N. Y.) 246; see also Goddard *v.* Benson, 15 Abb. Pr. (N. Y.) 191.

[6] Burhans *v.* Van Zandt, 13 N. Y. 523.

[7] Wood *v.* Byington, 2 Barb. Ch. (N. Y.) 387.

[8] Requa *v.* Holmes, 16 N. Y. 193.

[9] Washington Ins. Co. *v.* Slee, 2 Paige Ch. (N. Y.) 365; Kelly *v.* Hooper, 3 Yerg. (Tenn.) 395; 9 Wend. (N. Y.) 649.

There is at common law no privity between an executor and the administrator *de bonis non cum testamento annexo*, and a judgment recovered by the former will not bar a suit brought by the latter;[1] and where the administrator recovers a judgment and dies, the succeeding administrator may bring a new action.[2] Nor is there any privity between an executor or administrator and the heir or devisee of the *land*, and a judgment against the former is not evidence against the latter to charge the real estate.[3]

A decree for the specific execution of a covenant real in a suit commenced by the covenantee, and afterward revived in favor of his heirs, is no bar to a suit brought by the administrator of the covenantee to recover damages for the breach of such covenant, if he was not made a party to the suit. The covenantor has no means of relieving himself from the double burden of executing the agreement and paying damages for the breach, in such case, save by resorting to a court of equity.[4]

It follows, as a necessary and invariable rule, that a judgment is not admissible to establish or defeat the essential rights of others than the parties indicated.[5] Either party to the record, however, may use it to establish a material fact in another suit between them;[6] but, unless the judgment is directly between *the same parties, or constitutes a part of the res gestæ* out of which the action in which it is sought to use it grew,[7] it is not admissible. Thus, in an action of slander against *a husband*, a judgment in a former suit between the

[1] Grout *v.* Chamberlin, 4 Mass. 611.

[2] Pastal *v.* Wards, Latch, 140; Barnhurst *v.* Yelverton, Yelv. 83; Gates *v.* Gough, id. 33; Allen *v.* Irwin, 1 S. & R. (Penn.) 549.

[3] Mason *v.* Peters, 1 Munf. (Va.) 437; Deneale *v.* Archer, 8 Pet. (U. S.) 528; Osgood *v.* Manhattan Co., 3 Cow. (N. Y.) 612; Neal *v.* M'Combs, 2 Yerg. (Tenn.) 10. Whether there is any privity between an executor or administrator and a legatee of *personals—quere.* Mason *v.* Peter, *supra*, and see a note to that case by the reporter. See Goddard *v.* Benson, 15 Abb. Pr. (N. Y.) 191.

[4] Combs *v.* Tarlton, 2 Dana (N. Y.), 474.

[5] Jackson *v.* Vedder, 3 Johns. (N. Y.) 8; Simson *v.* Kennedy, Harp. (S. C.) 370; Fowler *v.* Collins, 2 Root (Conn.), 231; Banks *v.* Sharp, 6 J. J. Mar. (Ky.) 180.

[6] James *v.* Buzzard, 1 Hempst. (Tenn.) 240.

[7] Wells *v.* Shipp, 1 Miss. 353.

plaintiff and the husband and his wife for the same slander, it was held not to be admissible ;[1] and the reason is, because neither the parties to, nor the ground of, the action are the same.[2] The rule is that a record of one suit cannot be read in another as evidence, unless both parties. or those under whom they claim, were parties to both suits, upon the ground that a document cannot be used against a party who could not have availed himself of it, had it been made in his favor.[3] Thus a suit by A. against B., on the death of A., was revived by C. and D., his brothers and heirs ; and it was held that the record of a former suit by C. against B., in which the same identical point was in controversy, was not admissible in evidence, A. not claiming title under C.[4] A judgment against the principal is not conclusive upon a surety who was not made a party to the suit.[5] Where, for the reasons stated, a judgment cannot be used against a party, it cannot be used in his favor.[6] The fact that an appeal is pending from a judgment, or a motion for a new trial, does not defeat its force or admissibility as evidence ; *until actually reversed, it is conclusive against the parties.*[7] There are instances in which a record is admissible against a party to it, in favor of one who is not, *to show his acts ;* as, that his possession of a tract of land extended to a particular boundary.[8] So records may be admitted in suits not between the same parties or privies, *where, upon the facts of the trial and the recoveries in such records, the interests of others hang as incidents or consequences.* In such instances the production of such a record is proof that the suit was brought and

[1] Magauran *v.* Patterson, 6 S. & R. (Penn.) 278. That the parties must be the same, see Strutt *v.* Bovington, 5 Esp. 56 ; Morse *v.* Williams, C. & M. 615 ; Blakemore *v.* Glanmorgan Canal Co., 2 C. M. & R. 133 ; Smith *v.* Webber, 1 Ad. & El. 118.

[2] Killingsworth *v.* Bradford, 2 Overt. (Tenn.) 204 ; Paynes *v.* Coles, 1 Munf. (Va.) 373 ; Chapman *v.* Chapman, 1 Munf. (Va.) 398.

[3] Paynes *v.* Coles, 1 Munf. (Va.) 373.

[4] Chapman *v.* Chapman, 1 Munf. (Va.) 398.

[5] Clark *v.* Montgomery, 23 Barb. (N. Y.) 464 ; Thomas *v.* Hubbell, 15 N. Y. 405.

[6] Chites *v.* Conley, 2 Dana (Ky.), 21.

[7] Chase *v.* Jefferson, 1 Houst. (Del.) 257.

[8] Smith *v.* Shackleford, 9 Dana (Ky.), 452.

the recovery had as therein set forth, but the consequences to others resulting from those facts apparent from the face of the record, are to be established by appropriate evidence of such other facts as may be necessary to sustain the action or defense.[1]

Sec. 237. Judgment Conclusive of Fact Recorded.

Judgments and verdicts in the superior courts are always of record. They have, therefore, the character which belongs to all records, that they are not to be contradicted by evidence. If a verdict finding several issues is produced in evidence the opposite party will not be allowed to show that no evidence was offered on one of the issues, and that the verdict as to that issue was indorsed on the *postea* by a mistake.[2] On an indictment for assisting the escape of a convict out of prison, if the record of the conviction is produced by the proper officer, evidence is not admissible to dispute the statement in the record, or to show that it never was filed among the other records of the county; even though the indictment refers to it with a *prout patet*, as remaining among those records.[3]

Sec. 238. Not Conclusive on Immaterial Averments.

A record will not be conclusive as to the truth of allegations which were not material nor traversable.[4] Thus a party will not be estopped from averring, in an action of debt on a bond, that the bond was made at A., though in a former action on the same bond he averred it to have been made at B.;[5] nor in the case of a conviction for a felony, where the jury has given a general verdict, the record will not be conclusive that the offense was committed on the day mentioned in the indictment, *for the time is not of the substance of the charge;* and therefore a party interested to dispute a forfeiture (which in the case of real property relates to the time of the offense) may show that the offense was committed on a different day from that alleged in the record.[6]

[1] Key *v.* Dent, 14 Md. 86.

[2] Reed *v.* Jackson, 1 East, 355.

[3] R. *v.* Shaw, R. & R. Cr. C. 526.

[4] Co. Lit. 352 b., or on a fact not in issue.

[5] Com. Dig., tit. Estoppel, E., 6.

[6] Ive's Case, 3 Inst. 230; Gilb. Ev. 230. See Co. Lit. 352 b.; and Att. Gen. *v.* King, 5 Pri. 195.

The record of a judgment or verdict not being liable to contradiction as to the truth of its contents, the question as to its admissibility or effect in evidence must depend on the inferences attempted to be drawn from it. These inferences are sometimes necessary and conclusive, and sometimes optional with juries. Where a judgment is produced merely for the purpose of showing that such a proceeding actually took place (as, upon an indictment for perjury at a trial, with a view of showing that the trial actually took place),[1] the record is conclusive of the fact that the proceeding did take place.

Sec. 239. Effect of Judgment.

The legal consequences arising from the simple fact of a judgment having been pronounced by a court of competent jurisdiction are very numerous. In some cases, a judgment constitutes part of a title; in others, it is used merely to show a suit determined, or to let in evidence of what was sworn upon a trial, or to justify proceedings in execution of the judgment, or to entitle a partner to contribution, or for some other purpose to which it is properly applicable as a judgment. So a judgment may be used to prove the fact that a party had by process of law been compelled to pay damages to a certain amount;[2] but not to prove the circumstances under which they were paid.[3] The celebrated judgment of De Grey, C. J., expressing the unanimous opinion of all the judges, in The Dutchess of Kingston Case,[4] gives such a clear and comprehensive view of the general principles applicable to the subject in hand that it will be desirable to give a portion of it here. He said: "What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a

[1] See R. *v.* Iles, Ca. temp. Hardw. 118; R. *v.* Page, 2 Esp. 649 n. See also B. N. P. 243; R. *v.* Gordon, Car. & M. 410.

[2] Green *v.* New River Company, 4 T. R. 590.

[3] See by Cresswell, J., 6 M. & G. 165.

[4] 20 How. St. Tr. 578.

a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers.[1] There are some exceptions to to this general rule, founded upon particular reasons, but not being applicable to the present subject it is unnecessary to state them. From the variety of cases relative to judgments being given in evidence in civil suits, it may be stated: First, that a judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, *between the same parties, upon the same matter directly in question in another court.* Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, *is conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose.* But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

[1] This principle is universally acknowledged. See Burrill *v.* West, 2 N. H. 190; Wood *v.* Davis, 7 Cranch (U. S.), 271; Davis *v.* Wood, 1 Wheat. (U. S.) 6; Paynes *v.* Coales, 1 Munf. (Va.) 373; Turpin *v.* Thomas, 2 H. & M. (Va.) 139; Jackson *v.* Vedder, 3 Johns. (N. Y. 8; Case *v.* Reeves, 14 id. 79; Ryer *v.* Atwater, 4 Day (Conn.), 431; Killinsworth *v.* Bradford, 2 Overt. (Tenn.) 204; Wood *v.* Stephen, 1 S. & R. (Penn.) 175; Estep *v.* Hutchman, 14 id. 435; Tabor *v.* Perrott, 2 Gall. (U. S.) 565; Twambly *v.* Henley, 4 Mass. 441; Respublica *v.* Davis, 3 Yeates (Penn.), 128; Johnson *v.* Bourn, 1 Wash. (U. S.) 187; Stevelie *v.* Read, 3 Wash. (U. S. C. C.) 247; Cleaton *v.* Chambliss, 6 Rand. (Va.) 86; Neal *v.* McComb, 2 Yerg. (Tenn.) 10, 12; Blount *v.* Darrach, 14 S. & R. (Penn.) 184, 186, note; Este *v.* Strong, 2 Hamm. (Ohio) 401; Fisk *v.* Weston, 5 Me. 410; Cowles *v.* Harts, 3 Conn. 516; James *v.* Stookey, 1 Wash. (U. S. C. C.) 530; Chapman *v.* Chapman, 1 Munf. (Va.) 398; Frazier *v.* Frazier, 2 Leigh (Va.), 642, 650; Munford *v* Overseers, 2 Rand. (Va.) 313, 318; Floyd *v.* Mintsey, 5 Rich. (S. C.) 361; Riggins *v.* Brown, 12 Geo. 271; Persons *v.* Jones, id. 371; Michan *v.* Wyatt, 21 Ala. 813; Fallon *v.* Murray, 16 Miss. 168; Duncan *v.* Helms, 8 Gratt. (Va.) 68. See also Rapelye *v.* Prince, 4 Hill (N. Y.), 119; Alexander *v.* Taylor, 4 Denio (N. Y.), 302.

Sec. 240. Distinction Between Judgments of Courts of Exclusive and Concurrent Jurisdiction.

A much more conclusive effect is attributed to the judgments of courts of *exclusive* jurisdiction than to the judgments of courts which have only *concurrent* jurisdiction. With regard to *the parties* between whom they are to be used, and the *matter* to which they relate, these two classes of judgments are put upon the same footing, and subject to the same limitation and restriction; the *matter* must be the same, the *parties* also the same. But in one important particular they differ, that is, with reference to the *occasion* and the *manner* in which it is proposed to use them. It is only upon a matter *directly in question* that the judgment of a court of *concurrent* jurisdiction is conclusive — while the judgment of a court of *exclusive* jurisdiction is conclusive, not only when the matter comes in question directly, but also when it comes *incidentally* in question. This difference in the effect of the judgments arises from the difference in the constitution of the courts which pronounce them. When a matter, over which some other court is allowed to have exclusive jurisdiction, comes in question — whether directly or incidentally — and the judgment of such a court is offered in evidence as proof of the matter, it must necessarily be *conclusive;* implicit credit must be given to a court so constituted, while its judgment is unreversed and in full force; for the court in which the particular matter is to be proved has no authority to examine into the merits of the judgment, and must take the matter as judicially and conclusively decided.

Sec. 241. Judgments In Rem.

There is another class of judgments which are technically termed judgments *in rem;* and these are conclusive, not only as against parties and privies, but also as against strangers. A judgment *in rem* may perhaps be defined to be the judgment of a court of exclusive or at least peculiar jurisdiction, declaratory either of the nature and condition of some particular thing, or of the condition and *status* of some particular person. This definition is by no means put forward as a perfect one. Mr. Smith defined a judgment *in rem* to be

"an adjudication (as its name indeed denotes) upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose."[1] And he takes exception to the inference to be drawn from some dicta, that such a judgment must be one of a court of *exclusive jurisdiction*. "The universal effect," he says, "of a judgment *in rem* depends, it is submitted, on this principle, viz., that it is a solemn declaration, proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon; *which very declaration operates accordingly upon the thing adjudicated upon*, and *ipso facto* renders it such as it is thereby declared to be." And he afterward says: "And it is submitted, that this must be Lord COKE's meaning where he states in 1 Inst. 352 b. that 'where the record of the estoppel doth run to the disabilitie or legitimation of the person, there all strangers shall take benefit of that record, as *outlawrie*, *excommengement*, *profession*, *attainder of præmunire*, &c., *felonie*, &c., *bastardie*, *mutiertie*, and shall conclude the parties, *though they be strangers to the record*.' In all these cases, it will be observed, the record operates upon the *status* of the individual." But it is also to be observed, that in all these cases, the judgment is that of a court of exclusive, or at least, peculiar jurisdiction.

The term "judgment *in rem*" is, perhaps, in strictness, objectionable when applied to the *status* of a *person*. The term itself is probably derived from the civil law, where actions were classed as *actiones in personam* and *actiones in rem*; the former including actions upon contract or for injuries ("*ex contractu vel ex maleficio*"); the latter referring to actions in which some particular thing was the subject-matter of the controversy ("*cum movet alicui de aliqua re controversiam*").[2] The distinctive difference between these actions and our "personal and real actions," is known to every lawyer. Under the Roman law, therefore, a judgment *in rem*, generally, was "*ut rem ipsam restituat* (*possessor*) *cum fructibus*."[3]

[1] 2 Smith's Lead. Ca. 439.

[2] Inst. lib. 4, tit. 16, § 1.

[3] Inst. lib. 4, tit. 17, § 2.

A judgment *in rem* in our law may properly be so termed when it is the sentence of a court declaring the nature or quality of a particular *thing; e. g.*, the decision of the court of admiralty declaring a vessel to be lawful prize; or a judgment of condemnation for forfeiture, under the excise laws by the court of exchequer. Where, however, the judgment declares the condition or *status* of a *person*, it would seem to be more properly termed a judgment *quasi in rem.*

Sec 242. What Parties Bound by a Judgment.

A judgment is *conclusive* between the same parties, between all *claiming under the parties;* and it is only just that if the parties to a suit are to be bound by a judgment, all claiming under them ought likewise to be bound. It was resolved by HOLT, C. J., and the other judges of the court, that no record of a conviction or verdict can be given in evidence, but such whereof the benefit may be mutual; that is, such as might have been given in evidence, either for the plaintiff or the defendant.[1] GILBERT, C. B., lays it down, "that nobody can take benefit by a verdict who had not been prejudiced by it, had it gone contrary."[2]

[1] R. *v.* Warden, Holt, 134; B. N. P. 233. It is a rule of estoppels, that they must be reciprocal. Co. Lit. 352; Com. Dig., tit. Estoppel; Gaunt *v.* Wainman, 3 N. C. 69; Marchant *v.* Errington, 6 id. 79.

[2] Gib. Ev. 28; B. N. P. 232; Ward *v.* Wilkinson, 4 B. & A. 412. The case of Whateley *v.* Menheim, 3 Esp. 608—where a verdict on an issue directed by the court of exchequer to try a question of partnership, was used by a stranger—does not appear consistent with principle. Lansing *v.* Montgomery, 2 Johns. (N. Y.) 382; Paynes *v.* Coales, 1 Munf. (Va.) 373; Worcester *v.* Green, 2 Pick. (Mass.) 425; Ryer *v.* Atwater, 4 Day (Conn.), 431; Case *v.* Reeve, 14 Johns. (N. Y.) 79, 83; M'Kellar *v.* Bowell, 4 Hawks (N. C.), 34; Kazer *v.* State, 5 Hamm. (Ohio), 280; Maybee *v.* Avery, 18 Johns. (N. Y.) 352, 354. In Hurst's Lessee *v.* M'Neil (1 Wash. C. C. 70, 75), the defendant's counsel offered to read the record of a trial between the lessor of the plaintiff and one Pemberton; it does not appear what the precise object of this evidence was, nor in what relation Pemberton stood to the matter in dispute; but per WASHINGTON J., "Such evidence is inadmissible. If there be a point completely settled and at rest, it is this: that a verdict between different persons cannot be given in evidence in a suit of one of the parties against a stranger. It is true that in that case, Hurst, against whom the verdict is offered, had an opportunity of cross-examin-

It seems obviously unjust that proceedings should be evidence *against* a stranger, inasmuch as he had no opportunity of calling witnesses, or of cross-examining those on the other side, or of appealing against the judgment.[1]

On a bill in chancery against the executors of A., seeking to charge the estate with a debt due from the firm of A. & B., and stating the insolvency of B., the surviving partner; held, that a judgment at law against B., as surviving partner, in favor of the complainant, was no evidence of the existence of a debt from the firm, as against the executors, for there was no privity between B. and the executors; and the latter had no opportunity of being heard in the suit against B. The judgment, however, was allowed to be evi-

ing; yet it cannot be offered against Hurst, unless he might have offered it had it been in his favor. This is the settled rule. *Non constat* that the evidence necessary or supposed necessary by Hurst, in that case, was the same as in this. He might have been unsuccessful there, for many reasons which do not now exist—the absence of witnesses or the like." And though in the second suit one of the plaintiffs and all the defendants are the same as in the first, yet if they are new plaintiffs in the second suit, against whom the judgment in the first suit could not have been used had it been adverse, it shall not be admitted in their favor. Baring *v.* Fanning, 1 Paine (U. S.), 549; Chapman *v.* Chapman, 1 Munf. (Va.) 398. And it makes no difference that the new parties, as assignees of a chose in action, are endeavoring, together with the assignor, to enforce the same right that was established in the former suit in favor of the assignor. Thus, where C. shipped on board a vessel belonging to the defendants, a cargo of merchandise, consigned to the latter, who were merchants at New York, to be sold for the account of C., and on its arrival C. assigned the cargo and its proceeds to B., M. and R.; held, that on a bill filed by C., B., M. and R. against the defendants, praying an account of the proceeds of the shipment, &c., a decree in a cause between C. and the defendants, in which a large balance was established against the latter, could not be given in evidence by the plaintiffs. Baring *v.* Fanning, *supra*.

[1] The rule stated in the text has been recognized in many cases. Paynes *v.* Coales, 1 Munf. (Va.) 373; Jackson *v.* Vedder, 3 Johns. (N. Y.) 8; Case *v.* Reeves, 14 id. 79; Twambly *v.* Henley, 4 Mass. 441, 442; Wood *v.* Stephen, 1 S. & R. (Penn.) 175; Johnson *v.* Bourn, 1 Wash. (U. S.) 187; Cowles *v.* Harts, 3 Conn. 516; White *v.* Madison, 26 N. Y. 117; Mersereau *v.* Pearsall, 19 N. Y. 108. And it is no less applicable to criminal than civil cases. Accordingly, where two were indicted separately for the same arson, one convicted and judgment passed, held that the record was not admissible evidence against the other. Krzer *v.* The State, 5 Hamm. (Ohio) 280.

dence so far as to prove the fact that the complainant had sued B. and recovered.[1]

In a Pennsylvania case, when defendants, on being sued, plead in abatement the non-joinder of others as partners, and succeed, the record cannot be used in a subsequent suit, in which such others are joined, to charge them as liable with the rest. Against those who pleaded, the record is evidence that all who were alleged to be partners are so in fact; but the others must be proved partners in the ordinary way.[2]

A record is evidence against one who might have been a party to it, for he cannot complain of the want of those advantages which he has voluntarily renounced.[3]

An agreement between several persons, liable upon the same instrument to be bound by a verdict against one, may so far connect the rest with the proceeding as to render the verdict admissible in an action against them. Thus a special verdict, given in another action on the same policy of insurance, but against a different underwriter, has been received, where it was shown that all the underwriters had agreed to be bound by one verdict; for under the agreement they were each entitled to interfere on the former trial and cross-examine witnesses. It was held, however, not conclusive.[4]

But a person is not to be in any measure affected by a decision between others, merely because he was present at the trial and cross-examined the witnesses. He must, like a *party*, have had a full, fair and *previous* opportunity to meet the question in controversy.[5]

By the civil law, the case of principal and surety is not within the rule of *res inter alios acta*, and if the creditor recovers against the principal, he may use the judgment to conclude the surety.[6] But this is upon reasons and principles peculiar to that system, which in fact regards the principal and surety as the same party, and allows the latter "to

[1] Sturges *v.* Beach, 1 Conn. 507.

[2] Witner *v.* Schlatter, 2 Rawle (Penn.), 359.

[3] Bac. Ab. Ev. F. 616; 1 Starkie's Ev. 195.

[4] Patton *v.* Caldwell, 1 Dall. (U. S.) 419.

[5] Turpin *v.* Thomas, 2 H. & M. (Va.) 139, 147.

[6] 1 Evans' Poth. 562; Kip *v.* Brigham, 6 Johns. (N. Y.) 159; Laralde *v.* Derbigny, 1 Miller (La.), 85; Munford *v.* Overseer's, 2 Rand. (Va.) 313.

appeal against the judgment, or to form an opposition to it, if it is the last resort.[1]

At common law a different doctrine prevails; accordingly, where the sureties of a guardian were prosecuted to subject them upon the guardian bond for the default of their principal, the record of recovery against the guardian was held, in North Carolina, not admissible for the plaintiff.[2] A judgment against a debtor on a bill for account is not evidence against a guarantor having no notice of the suit.[3]

So in Pennsylvania, the record of a verdict and judgment in an action on a recognizance for good behavior, against the principal, was held not admissible to prove that he had broken his recognizance in an action against the surety.[4]

But in Virginia a wider range has been apparantly given to the judgment against the principal; and it seems there to be allowed as *prima facie* evidence against the surety on all points established by it.[5] And the same rule prevails in Ohio; and if the sureties have notice of the suit against the principal, and an opportunity to defend, the judgment will be *conclusive*.[6]

So, in covenant upon a general warranty in a deed of land, a judgment by a person claiming title against the vendee, of which the vendor had no notice, was held competent evidence to prove an eviction, but not to establish that such eviction was by title paramount.[7]

[1] 1 Evans' Poth. 562; McKeller *v.* Bowell, 4 Hawks (N. C.), 34; Munford *v.* Overseers, *ante*.

[2] M'Kellar *v.* Bowell, Hawks, (N. C.) 34; Mecklenburgh *v.* Clark, id. 43.

[3] Jackson *v.* Griswold, 4 Hill (U. S.), 522.

[4] Respublica *v.* Davis, 3 Yeates (Penn.), 128. In Carmack *v.* Commonweath, 5 Binn. (Penn.) 184, however, it was decided that a judgment in an action against the sheriff alone, of which his sureties had no notice, was *prima facie* evidence of the amount of damages, in a subsequent suit upon the recognizance against the sheriff and sureties jointly, but not conclusive.

[5] Munford *v.* Overseers, 2 Rand. (Va.) 313; Baker *v.* Preston, 1 Gilmer (Va.), 335; Jacobs *v.* Hill, 2 Leigh (Va.), 393; Braxton *v.* Winslow, 1 Wash. (Va.) 31.

[6] State *v.* Colerick, 3 Hamm. (Ohio), 487.

[7] Booker *v.* Bell, 3 Bibb (Ky.), 175; Prewitt *v.* Kenton, id. 280; Radcliff *v.* Ship, Hardin (Ky.), 292; Somerville's Ex'rs *v.* Hamilton, 4 Wheat. (U. S.) 230.

So, in actions by the vendee of personal property against the vendor, upon a warranty of title, a judgment obtained for the property against the vendee by a third person claiming to be the rightful owner, in a suit of which the vendor had no notice, cannot be given in evidence to prove that the latter had not title.[1]

And where the assignee sued the assignor of a chose in action, it was held that a verdict and judgment in favor of the maker, at the suit of the assignee, in which the jury found that the demand assigned had been paid previous to the assignment, could not be given in evidence to prove the fact thus found, unless the assignor had due notice of the first action, and an opportunity to meet the defense there set up. But where it is necessary that the assignee, in the exercise of due diligence, should prosecute the maker to judgment and execution, the judgment would be evidence to prove the fact of such diligence.[2]

So, where the indorsee of a note sued the maker, and failed because the consideration was usurious, it was held that the verdict and judgment were not evidence for the indorsee, in an action against the indorser (who was also the original payee), in order to establish the usury. "The record is proof of the proceedings and judgment, and nothing more."[3]

The same doctrine prevails in actions for indemnity; as where A. sued B., on a promise by the latter to save him harmless for selling certain goods as a constable under an execution against C.; it was held, that a judgment against A. for selling the goods obtained by D. in a suit of which B. had no notice, was not evidence of C.'s want of title; though it might be received to prove that D. had asserted his right to the goods, and that what A. had paid, he was compelled to pay by legal process.[4]

[1] Stephens *v.* Jack, 3 Yerg. (Tenn.) 403; Sanders *v.* Hamilton, 2 Hayw. (Tenn.) 226; Jacob *v.* Pierce, 2 Rawle (Penn.), 204.

[2] Maupin *v.* Compton, 3 Bibb (Ky.), 214.

[3] Copp *v.* M'Dougall, 9 Mass. 1.

[4] Burrill *v.* West, 2 N. H. 190; Coventry *v.* Barton, 17 Johns. (N. Y.) 142; Sanders *v.* Hamilton, 2 Hayw. (Tenn.) 282; Stone *v.* Hooker, 9 Cow. (N. Y.) 154. There are other authorities which seem to favor the admissibility of the judgment, under such circumstances as *prima facie* evidence upon all points.

Where, however, a party has a right of recovery over, secured to him either by operation of law or express contract, and he has given the person so responsible due notice of the suit, the judgment, if obtained without fraud or collusion, will be *conclusive* evidence for him against such person upon every fact established by it. The latter, then, cannot be viewed in the light of a mere stranger, but has the same means of controverting the adverse claim, as though he were the nominal and real party on the record.[1]

Sec. 243. Proceedings between Strangers.

Proceedings between persons who are strangers to the suit are considered *res inter alios acta;* and they are not admissible, even though they are offered not for the purpose of binding a party to the suit, but merely as evidence of some collateral fact. Thus, in an action of ejectment, where it became material to show that a private act of parliament had been passed in the reign of Edward the Sixth, which act could not be found after due search, it was proposed to give in evidence a special verdict in the reign of Charles the Second, wherein the jury found that such an act had been passed, and its provisions were set forth *in hæc verba;* but there being nothing to connect the parties to the ejectment with the parties to the suit in which the special verdict was given, it was held not to be admissible.

Sec. 244. Rule with reference to Real and Nominal Parties.

But in the same manner as admissions may be used against the real parties to a suit, though they are not the nominal parties to the record, it has been held that verdicts and judgments are receivable in evidence against the parties on whose account

Train *v.* Gould, 5 Pick. (Mass.) 380; Bond *v.* Ward, 1 N. & M'C. (S. C.) 201; Leather *v.* Poultney, 4 Binn. (Penn.) 352, 356; State *v.* Colerick, 3 Hamm. (Ohio), 487; Tyler *v.* Ulmer, 12 Mass. 163, 166, per PARKER, C. J. But we believe the doctrine, with its proper qualifications, to be as laid down in Burrill *v.* West, *supra*.

[1] Leather *v.* Poultney, 4 Binn. (Penn.) 352, 356; Hamilton *v.* Cutts, 4 Mass. 349, 353; Bender *v.* Fromberger, 4 Dall. (Penn.) 436; Witmer *v.* Schlatter, 2 Rawle (Penn.), 204.

the suits in which the judgments were obtained were instituted or defended.

Upon this principle, the equitable assignee of a chose in action has been estopped by a verdict and judgment thereon, in the same manner as if he were a party to the record, the suit having been prosecuted in the name of another for his benefit, and at his request and expense.[1] Where the same person was, in fact, a party to the former suit, having been sued by a wrong name, the mere misnomer is not sufficient to prevent the admission of the record in evidence; the parol proof will be received to show that notice in the former suit was served upon the party in the latter, though the name was different, and that he appeared in such suit and attended the taking of depositions therein.[2] The former judgment is not admissible unless rendered in an action between the same parties.[3]

Sec. 245. Rule as to Judgment in Ejectment.

Upon the ground that the lessor of the plaintiff and the tenant are substantially the real parties to an ejectment, a judgment in ejectment is admissible evidence in an action *for mesne profits*, and this, whether the action be brought by the nominal plaintiff, or by the lessor of the plaintiff, and whether the judgment be upon verdict or by default; but the judgment is not conclusive, unless pleaded by way of estoppel.[4] It seems to be settled also, that a judgment recovered by the defendant against the same lessor of the plaintiff in a former

[1] Rogers *v.* Haines, 3 Me. 362.

[2] Stevelie *v.* Reid, 2 Wash. (U. S. C. C.) 274. *Contra*, Allen *v.* Hall, 1 Marsh. (Ky.) 526.

[3] Mersereau *v.* Pearsall, 19 N. Y. 108.

[4] Doe *v.* Huddart, 2 C. M. & R. 316. And see Lewes *v.* Preece, 1 Tyrw. 410; B. N. P. 87, 232; Doe *v.* Harlow, 12 Ad. & El. 42, *n.* In ejectment between A. & B., the record of a former judgment in an action of trespass between B. and the *cestui que trust* of A., has been held admissible in Pennsylvania. Calhoun's Lessee *v.* Dunning, 4 Dall. (Penn.) 120. This was upon the ground that the parties were really, though not nominally, the same in both suits. See Rogers *v.* Haines, 6 Greenl. 362, cited *ante*, note, 255. The omission to strike out the name of the casual ejector, and insert that of the real defendant, is amendable after verdict; and if the real defendant enters into the common rule, proceeds to trial, &c., the judgment will be as conclusive against him as if the issue had been corrected. Bailey *v.* Fairplay, 6 Binn. (Penn.) 405.

ejectment, is admissible in evidence on the trial of a second ejectment by the same lessor of the plaintiff.[1] A judgment is in no case conclusive, unless pleaded by way of estoppel. It could not be pleaded in ejectment, because the defendant is bound by the terms of the consent rule to plead not guilty; but if the parties are the same, it is evidence to go to the jury. A record in replevin, between a tenant and the bailiff of his landlord making cognizance under him, has been held to be admissible evidence in a subsequent action between the tenant and the landlord himself.[2]

Sec. 246. When the Parties are the Same, but not Suing in the Same Right.

Though the individual be the same in the two suits, yet if he stood in a different relation or character on the two occasions, he will not be affected by a verdict or judgment in the first suit. This doctrine has been established in regard to estoppels. A woman is not estopped, after coverture, by an admission on record by her husband and herself during coverture; and an heir, claiming as heir of his father, is not estopped by an estoppel upon him as heir to his mother.[3] A party suing as executor in an action of debt upon a bond will not be estopped by having been barred in an action upon the same bond when he sued as administrator; but he may show that the letters of administration have been since repealed.[4] The general rule does not apply to a case where the plaintiff uses a record in a former suit against the defendant, whom he is suing for negligence as his servant or agent, not to prove the fact of the injury or negligence (for the record is not admissible for that purpose), but merely to prove the amount of damages which he has been compelled by law to pay to another person (the plaintiff in the former recorded suit).[5] In debt by A. against B. and C., on a joint and several bond, the condition of which, after reciting that C. had been appointed

[1] Strode *v.* Seaton, 2 C., M. & R. 731. See B. N. P. 232; 4 Bac. Ab., tit. Evidence, F. See also Wright *v.* Tatham, 1 Ad. & El. 19.

[2] Hancock *v.* Welsh, 1 Stark. 347.

[3] Com. Dig., tit. Estoppel, C.

[4] Robinson's Case, 5 Coke, 32 *b*.

[5] Green *v.* New River Company, 4 T. R. 590. See also Pritchard *v.* Hitchcock, 6 M. & G. 164.

collector of taxes, and that A. had agreed to become his surety, was that B. and C. should indemnify A. from all costs and charges which he should incur in consequence of his becoming such surety; the declaration alleged that C. had made default in not paying over a sum of money to the receiver-general, and assigned for breach, that by reason of such default A. had been compelled to pay £500 to the receiver-general; it was held that the mere production of a judgment signed against A., *under a judge's order*, for £500, at the suit of the receiver-general, was not evidence of the amount of damage sustained by A. in consequence of his suretyship.[1] On questions of public or general interest, such as questions of right of way and the like, verdicts and decrees in suits in which the same right was in litigation, are admissible in evidence, although such suits were between different parties; such evidence being in the nature of evidence of reputation.

Sec. 247. How far a Judgment Concludes a Party.

A judgment concludes the parties only *as to the grounds covered by it and the facts necessary to uphold it.* They will not be allowed to prove what is inconsistent with its rectitude and justice, for while it stands unreversed, it is final as to the points decided; not so, however, with respect to matters which the judgment itself shows were not in question; and hence, where the cause has gone off upon some defect which precluded an inquiry into the merits, the judgment is usually no bar to a second action. So the reversal of a judgment proves nothing but its own correctness; it operates no farther than to nullify what has been done; and in other respects the parties are generally left by it in the same situation, as to their rights and remedies touching the matter in controversy, as if no such judgment had ever existed. Therefore, where a decree of the supreme court of probate reversed that of the inferior court decreeing distribution, such reversal was held no bar to a bill in chancery for the same matter.[2] And upon the same principle the dis-

[1] King *v.* Norman, 4 C. B. 884.

[2] Harvey *v.* Richards, 2 Gall. (U. S.) 210.

mission of a bill in chancery is not always conclusive as to the complainant's right in a court of law, although the bill may have been filed for the same matter; for if the complainant seeks in a court of equity to enforce a strictly legal title when his remedy is at law, the dismission of the bill amounts merely to a declaration that he has no equity; but it casts no reflection upon his legal title, it decides nothing in relation to it and consequently can conclude nothing.[1] And though a decree in express terms professes to affirm a particular fact, yet if such fact was immaterial in the case, the decree will not conclude the parties in relation to it.[2]

Where the cause and object of both actions are the same, a judgment in the prior bars the subsequent suit. Where the cause or object of the actions are different, though the point in dispute is the same in both, the prior judgment is no bar to the subsequent action, but the verdict is matter of evidence to prove such point. But although a prior judgment may be no *bar*, strictly and technically speaking, where the cause or object of both actions are not identical, it does not follow that either party in the second action can be allowed to contradict what was expressly adjudicated in the first.[3] In a case before the United States supreme court,[4] the facts were that Lee sold Hopkins an estate, called "Hill and Dale," then under certain incumbrances, which Lee agreed to remove; and Hopkins was to pay therefor $1,800, partly in military lands and partly in some other way, as soon as the incumbrances were removed. Hopkins filed a bill in chancery against Lee, stating that Lee had omitted to pay the incumbrances, and that he, Hopkins, had been compelled to pay them. Upon hearing the bill, the court found that Hopkins had satisfied the incumbrances, but with the funds of Lee, advanced for that purpose, and thereupon decreed that Hopkins should pay Lee the overplus remaining in his

[1] Lessee of Wright *v.* Deklyne, 1 Pet. (U. S. C. C.) 198; Pleasants *v.* Clements, 2 Leigh (Va.), 474, 483. See Burchet *v.* Faulkner, 1 Dana (Ky.), 99, 100; Lancaster *v.* Laire, id. 109.

[2] Hotchkiss *v.* Nichols, 2 Day, 138; Coit *v.* Tracy, 8 Conn. 268; People *v.* Johnson, 37 Barb. (N. Y.) 502.

[3] Betts *v.* Starr, 5 Conn. 550.

[4] Hopkins *v.* Lee, 6 Wheat. (U. S.) 109.

hands after paying off the incumbrances. Lee then brought an action of covenant against Hopkins for not conveying the military lands agreeable to covenant; to which Hopkins pleaded that Lee had never discharged the incumbrances on the estate of Hill and Dale. Said the court: "No lawyer can suppose that, let the judgment or decree on the bill in chancery have been either way, it could have been pleaded in bar to the last action of covenant brought by Lee against Hopkins. The *object* of the bill in chancery was to get refunded money, which the purchaser of an estate alleged that he had been obliged to expend, to free the estate from incumbrances which the seller was bound to remove. The object of the action at law was to recover damages for not conveying the military lands, which were to be taken in part payment. Nothing could have been more distinct than the object of the two suits; they were not for the same matter, cause and thing, and let the issue of the bill in chancery have been as it might, the decree could not have been pleaded in bar of the action at law. But *by way of evidence*, the decree in chancery was held conclusive to prove that Lee had discharged the incumbrances on the estate, that being the matter directly adjudicated upon in the suit in chancery." And where a mortgagee brought ejectment to recover the mortgaged premises, and the mortgagor, on the trial, offered evidence to prove that the note which the mortgage was intended to secure was usurious and void; to which the mortgagee objected, on the ground that the mortgagor was estopped to show the alleged fact, by reason of a former judgment; the record of that judgment was produced, and it appeared from it that the mortgagee had sued the mortgagor on the note, that the latter had pleaded non-assumpsit therein with notice of the usury, and that a verdict and judgment were rendered for the mortgagor. It was conceded that the sole question litigated in the former suit was the same sought to be again controverted in the last. The judge thereupon sustained the objection, holding the first judgment *conclusive* in relation to the usury; and the supreme court afterward, on motion for a new trial, affirmed the decision.[1] So, though

[1] Betts *v.* Starr, *ante*.

nothing can certainly be more distinct than the object of an ejectment in England, and the action of trespass on the case for mesne profits, yet the judgment in ejectment is conclusive against the defendant *upon the right of possession*, at the time of the demise laid in the declaration.

Indeed the principal will be found to run through nearly all the American cases, that the judgment of a court of competent jurisdiction directly upon a particular point is, as between the parties, conclusive in relation to such point, though the purpose and subject-matter of the two suits be different; and hence that a judgment may not only be *evidence* but *conclusive evidence*, and still be no bar to a second action.[1] A former suit is a bar only to such claims or matters as might have been litigated under the pleadings and issue as made.[2] It is not a bar as to matters which might have arisen incidentally or collaterally, such as a payment made on a demand.[3] Nor as to an allegation in the complaint in such former action, the truth of which was not involved in the judgment rendered.[4] Nor will a judgment by default on one of two notes, given upon an illegal contract, preclude the defendant from interposing his defense to an action on the second note.[5] But where the principal question, upon which the plaintiff's right of recovery depends, has been determined in a former action, such former adjudication will be held conclusive in a new action on one of several securities springing out of the same transaction.[6] As between the parties and privies a judgment is conclusive as to every question upon which the right of the plaintiff to recover, or the validity of a defense in another suit is found to depend, and upon the determination of which

[1] Betts *v.* Starr, 5 Conn. 550; Wright *v.* Deklyne, 1 Pet. (U. S. C. C.) 198; Starkie *v.* Woodward, 1 N. & M'Cord (S. C.) 329; Canaan *v.* Greenwoods Turnp. Co., 1 Conn. 1; Cist *v.* Zeigler, 16 S. & R. (Penn.) 282; Gardner *v.* Buckbee, 3 Cow. (N. Y.) 120; Wright *v.* Butler, 4 Wend. (N. Y.) 284.

[2] Burdick *v.* Post, 12 Barb. (N. Y.) 168; Bates *v.* Stanton, 1 Duer (N. Y.), 79.

[3] Smith *v.* Weeks, 26 Barb. (N. Y.) 463.

[4] Sweet *v.* Tuttle, 14 N. Y. 465.

[5] Hughes *v.* Alexander, 5 Duer (N. Y.), 488.

[6] Birkhead *v.* Brown, 5 Sandf. (N. Y. 134.)

it appears from the record or is shown by extrinsic proof that the judgment was in reality founded. If a defense be interposed and prevail, the fact or facts on which it is based become *res adjudicata*; thus a defense of usury established renders the usurious security void for any future use or purpose.[1]

The rule as to the conclusiveness of judgments has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. It is, therefore, not confined in England or in this country to judgments in the same courts, or to decisions of courts of concurrent jurisdiction.[2] It has been applied to decrees of the orphan's court of Pennsylvania,[3] to a discharge under the insolvent laws;[4] to a decision of the court of probates, though admitted to be erroneous;[5] to a decree of the county court upon a complaint pursuant to the statute, by which decree it was found the duty of a town to repair certain bridges;[6] to a decision of a court of common pleas, upon a complaint made pursuant to the statute, for overflowing lands;[7] to a decree of the county court, awarding money to a claimant, arising from the sale of lands by the sheriff, though the decree was made upon a mistaken notion of law, and though the case admitted of no remedy by writ of error;[8] to record of the forfeiture of a recognizance, where debt was brought upon such recognizance;[9] to decrees of a court of equity; to sentences of courts of admiralty and of ecclesiastical tribunals, and in short to every court which has proper cognizance of the

[1] Central City Bank *v.* Dana, 32 Barb. (N. Y.) 296.

[2] Hopkins *v.* Lee, 6 Wheat. (U. S.) 109, 114.

[3] President of the Orphan's Court *v.* Goff, 14 S. & R. (Penn.) 181; M'Pherson *v.* Cunliff, 11 id. 422.

[4] M'Kinney *v.* Crawford, 8 S. & R. (Penn.) 351; Sheets *v.* Hawk, 14 id. 173.

[5] Brown *v.* Lanman, 1 Conn. 467; Jackson *v.* Robinson, 4 Wend. (N. Y.) 436.

[6] Canaan *v.* Greenwoods T. Co., 1 Conn. 1.

[7] Adams *v.* Pearson, 7 Pick. (Mass.) 341; Gay *v.* Welles, id. 217.

[8] Gratz *v.* The Lancaster Bank, 17 S. & R. (Penn.) 278.

[9] Shriver *v.* Commonwealth, 2 Rawle (Penn.), 206.

subject-matter, so far as they profess to decide the particular matter in dispute.[1]

Sec. 248. Effect of Foreign Judgments.

In England, the rule seems to be that, when a foreign judgment is made the foundation of an action, it is conclusive as to the merits.[2] But when it comes incidentally in question that it is only *prima facie* evidence.[3] But in our courts directly the reverse of this rule generally obtains, and a foreign judgment, when made the foundation of an action, is no more than *prima facial* evidence, and it may be impeached by showing that it was irregularly obtained, or, indeed, upon almost any ground which would have been a defense to the original suit.[4] In some cases it has been held that if the defendant produces proof which is sufficient to raise a presumption that the plaintiff's original claim was groundless, the latter will be put to prove his claim *de novo* the same as though no judgment had been rendered.[5] But the better opinion seems to be, that if the foreign court had jurisdiction of the subject-matter of the action and the parties, as if the defendant was personally served with notice of the suit in a legal manner, the judgment will be conclusive, and especially is this the case where the defendant appeared and answered the suit.[6]

In Ohio, an action was brought on a justice's judgment of a neighboring State, and COLLET, J., delivering the opinion, said: "This judgment, although not within the act of Congress, is within the provision of the constitution. It is a judicial proceeding, to which full faith and credit is to be given. A

[1] Hopkins *v.* Lee, 6 Wheat. (U. S.) 109.

[2] Gold *v.* Canham, 2 Swanst. 325; Tarleton *v.* Tarlton, 4 M. & S. 21; Phillips *v.* Hunter, 2 H. Bl. 410; Herbert *v.* Cook, Wils. 36 *n.*

[3] Houlditch *v.* Donegal, 2 Cl. & F. 478.

[4] Barney *v.* Patterson, 6 H. & J. (Md.) 182; Hoxie *v.* Wright, 2 Vt. 267; Benton *v.* Burgot, 10 S. & R. (Penn.) 240; Smith *v.* Lewis, 3 Johns. (N. Y.) 157; Robinson *v.* Prescott, 4 N. H. 450; Hall *v.* Williams, 6 Pick. (Mass.) 232; Gulick *v.* Loders, 2 N. J. Eq. 68; Winchester *v.* Evans, Cooke (Tenn.), 420.

[5] King *v.* Gilder, 1 D. Chip. (Vt.) 59.

[6] Taylor *v.* Bryden, 8 Johns. (N. Y.) 173; Cincinnati, &c., R. R. Co. *v.* Wynne, 16 Ind. 385; Sandford *v.* Sandford, 28 Conn. 6.

State or nation is bound, and has the exclusive right to administer justice within its territories to parties there contending. When the parties have had an opportunity of being heard, and a definitive decree has been pronounced, a regard to this right and duty of every State and nation, and to justice, requires that the justice of the sentence should not be re-examined by the tribunals of another State or nation, unless it is shown that the sentence was obtained by fraud.[1] The courts in England had not uniformly regarded this principle of the law of nations, therefore it was, it is probable, that this was introduced into our constitution."[2] It is further said, that whether the court rendering the judgment is a court of record or not, if it had jurisdiction, its decision is conclusive, and, until it is reversed, the parties cannot again litigate the same matter, unless there was fraud in obtaining it.[3]

And all the American cases agree, that where a foreign judgment comes *incidentally* in question, it is conclusive.[4] As where it is used as the foundation of a title derived under it;[5] or to show that the subject-matter of the action has once passed *in rem judicatem*;[6] or introduced by a guarantor, as a defense, in order to show that his principal was not liable.[7] or is relied upon by the garnishee in a foreign attachment, for the purpose of protecting himself against the claims of his original creditors;[8] or by the underwriter, in a policy of

[1] Vat. b. 2, c. 7, § 84.

[2] Silver Lake Bank *v.* Harding, 5 Hamm. (Ohio) 545.

[3] See also Poorman *v.* Crane, 1 Wright (Ohio), 347; Goodrich *v.* Jenkins, id. 348; Silver Lake Bank *v.* Harding, id. 430; Kuhn *v.* Miller, id. 127.

[4] Barney *v.* Patterson's Lessee, 6 H. & J. (Md.) 182, 202, 203; Smith *v.* Lewis, 3 Johns. (N. Y.) 168, 169; James *v.* Allen, 1 Dall. (Penn.), 188; Andrews *v.* Herriot, 4 Cow. (N. Y.) 520, 521.

[5] Barney *v.* Patterson's Lessee, 6 H. & J. (Md.) 182, 202, 203; Thompson *v.* Tolmie, 2 Pet. (U. S.) 157.

[6] Smith *v.* Lewis, 3 Johns. (N. Y.) 157.

[7] Griswold *v.* Pitcairn, 2 Conn. 85.

[8] Taylor *v.* Phelps, 1 H. & G. (Md.) 492; see also Holmes *v.* Remsen, 4 Johns. Ch. 460; S. C., 20 Johns. 229; Bissell *v.* Briggs, 9 Mass. 462; Flower *v.* Parker, 3 Mas. (U. S.) 247; Perkins *v.* Parker, 1 Mass. 117; note to Andrews *v.* Herriot, 4 Cow. (N. Y.) 521; Scott *v.* Coleman, 5 Litt. (Ky.) 349, 350; Moore *v.* Spackman, 12 S. & R. (Penn.) 287.

insurance, to show a breach of warranty on the part of the insured, in an action upon the policy ;[1] or by a party to justify himself for acts done in virtue of it ;[2] but all the cases agree that a judgment rendered without jurisdiction is void, and to be treated as a nullity, whether it comes in question directly or collaterally.[3]

A judgment of the supreme court or a circuit court of the United States, when offered in evidence in a State court, is not to be treated in regard to its effect as a foreign, but as a domestic judgment.[4]

By the constitution of the United States, it is declared that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." And congress is authorized by general laws to prescribe the manner in which such acts, records and proceedings shall be proved, and the *effect thereof.* In pursuance of this authority, congress, after providing for the mode of proof, has declared that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." By a supplementary statute, the provisions of the original act are extended to the records and judicial proceedings of the respective territories of the United States, and the countries subject to the jurisdiction of the United States.

There has been some diversity of opinion with respect to the interpretation of this clause of the constitution, particularly as to the words in the latter branch of the section, "and the effect thereof." Some judges have thought that the word "thereof" has reference to the proof or authenti-

[1] Croudson *v.* Leonard, 4 Cranch (U. S.), 434.

[2] Bissell *v.* Briggs, 9 Mass. 462 ; Rapelje *v.* Emery, 2 Dall. (Penn.) 231 ; Hoxie *v.* Wright, 2 Vt. 269.

[3] Elliot *v.* Piersoll, 1 Pet. (U. S.) 328 ; Fisher *v.* Harnden, 1 Paine (U. S.), 55 ; Holmes *v.* Boughton, 10 Wend. (N. Y.) 75 ; Walker *v.* Maxwell, 1 Mass. 103 ; Collett *v.* Keith, 2 East, 261 ; Thompson *v.* Tolmie, 2 id. 157.

[4] See Barney *v.* Patterson, 6 H. & J. (Md.) 182, 203 ; St. Albans *v.* Bush, 4 Vt. 58 ; Pepoon *v.* Jenkins, 2 Johns. Cas. (N. Y.) 119 ; Reed *v.* Ross, 1 Baldw. (U. S. C. C.) 36.

cation, so as to read "and to prescribe the effect of such proof or authentication." Others have thought that it referred to the antecedent words, "acts, records and proceedings," so as to read "and to prescribe the effect of such acts, records and proceedings."[1] Those who were of opinion that the preceding section of the clause made judgments in one State conclusive in all others, naturally adopted the former opinion; for otherwise, the power to declare the effect would be either wholly senseless or congress would possess the power to repeal or vary the full faith and credit given by that section. Those who were of opinion that such judgments were not conclusive, but only *prima facie* evidence, as naturally embraced the other opinion, and supposed that until congress should by law declare what the effect of such judgment should be, they remained only *prima facie* evidence.[2]

The former seems the interpretation generally adopted; but it is not practically of much importance which construction prevails, since each admits of the competency of congress to declare the effect of judgments when duly authenticated, which has been done. It may be stated, as a principle now uniformly received and sanctioned throughout the United States, that the judgment of one of the State courts is of the same dignity in every other State as in the one where it was pronounced; and hence, if in the courts of the State where the judgment was pronounced, it is conclusive in its operation as evidence, or otherwise, it must be equally so and to the same extent in all the courts throughout the Union.[3]

[1] Bissell *v.* Briggs, 9 Mass. 462, 467; Winchester *v.* Evans, Cooke (Tenn.), 420; Hitchcock *v.* Aicken, 1 Cai. (N. Y.) 460; Green *v.* Sarmiento, 1 Pet. (U. S. C. C.) 74; Field *v.* Gibbs, id. 155; Commonwealth *v.* Green, 17 Mass. 515.

[2] 3 Story's Const. 181.

[3] Mills *v.* Duryee, 7 Cranch (U. S.), 481; Clark *v.* Carrington, 7 id. 308; Hampton *v.* M'Connell, 3 Wheat. (U. S.) 234; Mayhew *v.* Thatcher, 6 id. 129; Hoxie *v.* Wright, 2 Vt. 263; Buford *v.* Buford, 4 Munf. (Va.) 241; Borden *v.* Fitch, 15 Johns. (N. Y.) 121; Andrews *v.* Montgomery, 19 id. 162; Field *v.* Gibbs, 1 Pet. (U. S. C. C.) 155; Commonwealth *v.* Green, 14 Mass. 515; Gibbons *v.* Livingston, 6 N. J. L. 236; Newell *v.* Newton, 10 Pick. (Mass.) 470; Hall *v.* Williams 6 id. 232; Spencer *v.* Brockway, 1 Ham. (Ohio), 259; Benton *v.* Burgot, 10

All the cases above cited will be found to agree that the judgment of a neighboring State may be wholly impeached by showing that the court rendering it had not jurisdiction; and it makes no difference whether the judgment comes in question directly or incidentally.[1] And if the judgment is inconclusive in the State where it was rendered, or if it is inquirable into there during a particular period and on certain conditions, it will be open to investigation to the same extent everywhere else. This is an obvious deduction from the foregoing position with regard to the effect of such judgments generally. It is, moreover, directly sanctioned by several well-considered cases.[2]

Some of the authorities have a vague way of impeaching such judgments by showing that they were fraudulently obtained.[3] Possibly this may mean fraud in acquiring jurisdiction; as where jurisdiction has professedly been obtained

S. & R. (Penn.) 240; Mitchell *v.* Osgood, 4 Me. 124; Wheeler *v.* Raymond, 8 Cow. (N. Y.) 311; Shunway *v.* Stilwell, 6 Wend. (N. Y.) 447; Starbuck *v.* Murray, 5 id. 148; Holbrook *v.* Murray, 5 id. 161; Rogers *v.* Coleman, Hard. (Ky.) 413; Scott *v.* Coleman, 5 Litt. (Ky.) 349; Evans *v.* Tatem, 9 S. & R. (Penn.) 259, 260; Kean *v.* Rice, 12 id. 203; Gilman *v.* Houseley, 5 Martin's La. Rep., N. S. 661; Mackee *v.* Cairnes, 2 id. 599; Clark *v.* Day, 2 Leigh (Va.), 172; Hayman *v.* Miller, 1 Bailey (S. C.), 242; Holt *v.* Alloway, 2 Blackf. (Ind.) 108; Gulick *v.* Loder, 1 Green, 68; Earthman *v.* Jones, 2 Yerg. (Tenn.) 484. See also, Jacobs *v.* Hull, 12 Mass. 25; Wade *v.* Wade, Cam. & Norw. 486; Betts *v.* Death, Addis. (Penn.) 265; Curtis *v.* Gibbs, 1 Penn 399; Smith *v.* Rhoades, 1 Day (Conn.), 168; Wernwag *v.* Pawling, 5 G. & J. (Md.) 500; Bradshaw *v.* Heath, 13 Wend. (N. Y.) 407; McRae *v.* Mattoon, 13 Pick. (Mass.) 53; Tipton *v.* Maryfield, 10 La. 189; Hinton *v.* Townes, 1 Hill (N. Y.), 439; Adams *v.* Rowe, 14 Me. 89; Goodrich *v.* Jenkins, 1 Wright (Ohio), 348; Hunt *v.* Lyle, 8 Yerg. (Tenn.) 142; 6 id. 412.

[1] See Elliot *v.* Piersol, 1 Pet. (U. S.) 328, 340; Thompson *v.* Tolmie, 2 id. 157; Holmes *v.* Boughton, 10 Wend. (N. Y.) 75; Bradshaw *v.* Heath, 13 id. 407; Walker *v.* Maxwell, 1 Mass. 103; Fisher *v.* Harnden, 1 Paine (U. S. C. C.), 55.

[2] Green *v.* Sarmiento, 1 Pet. (U. S. C. C.) 74; Baugh *v.* Baugh, 4 Bibb (Ky.), 556; Curtis *v.* Gibbs, N. J. Eq. 399; Rogers *v.* Coleman, 1 Hardin (Ky.), 420; Armstrong *v.* Carson, 2 Dall. (Penn.) 302; 1 Story's Com. on the Const. 183; Wernwag *v.* Pawling, 5 H. & J. (Md.) 500.

[3] See Andrews *v.* Montgomery, 19 Johns. (N. Y.) 162; Borden *v.* Fitch, 15 id. 121; Holt *v.* Alloway, 2 Blackf. (Ind.) 108; Silver Lake Bank *v.* Harding, 5 Ham. (Ohio), 545.

against a non-resident by attaching his property, and the property attached was merely nominal, as a chip or the like, or did not belong to the defendant. In such case the judgment might be void, even by the local law;[1] or it may relate to instances where jurisdiction has been exercised in fraud of the sovereignty which had the rightful and exclusive jurisdiction.[2] It is clear that wherever the point has been started, courts, in examining these judgments, have generally felt themseves restricted to inquiries respecting the effect to which they would be entitled in a collateral suit in the State where they were pronounced.[3] In Massachusetts, it has been directly determined that in an action on the judgment upon another estate, the defendant cannot be allowed to show that it was obtained by fraud and misrepresentation.[4]

Some discussion has arisen as to what kind of judgments were included within the constitution and the law of congress. In Massachusetts, it has been settled that they embraced only civil judgments, and does not extend to judgments in criminal proceedings. Hence, a conviction of an individual in New York of an infamous offense was held, in the former State, not to disqualify him from being a witness;[5] but in North Carolina a different doctrine is maintained. There it has been held that a judgment of conviction in a neighboring State of an infamous crime is within the con-

[1] Beech *v.* Abbott, 6 Vt. 592; Rogers *v.* Coleman, Hardin (Ky.), 418.

[2] Borden *v.* Fitch, 15 Johns. (N. Y.) 121; Jackson *v.* Jackson, 1 id. 424; Harding *v.* Alden, 9 Me. 140.

[3] In Moren *v.* Killibrew, 2 Yerg. (Tenn.), 379, WHYTE, J., delivering the opinion in a case which involved the extent to which such inquiry might go, said: "I disclaim all power over that court or its proceedings, whether it hath rendered a correct, a regular or an erroneous judgment upon the subject-matter before it. This court confines itself within that narrow limit of inquiry, incidental, from necessity, to all courts which are called on to enforce and carry into effect the judgment of some other court. That limit is an inquiry into the jurisdiction of the court rendering the judgment."

[4] McRea *v.* Mattoon, 13 Pick. (Mass.) 53; Smith *v.* Lewis, 3 Johns. (N. Y.) 517.

[5] Commonwealth *v.* Green, 17 Mass. 515.

stitution and act of congress, and renders the person convicted incompetent.[1]

In New Hampshire, it is held that a judgment of a justice of the peace of another State cannot be authenticated according to the law of congress; and it is, therefore, regarded as standing upon the same footing with a foreign judgment, leaving the whole merits open for reinvestigation.[2]

In Massachusetts, the courts are not disposed to extend the constitution and law of congress any further than the decisions of the Federal court necessarily require, and have accordingly held with New Hampshire in respect to the judgments of justices of the peace. Their language on this subject is as follows: "Certainly we think the judicial proceedings referred to in the constitution were supposed, by the congress which passed the act providing the manner of authenticating records, to have related to proceedings of courts of general jurisdiction, and not those which are merely of municipal authority; for it is required that the copy of the record shall be certified by the clerk of the court, and that there shall be also the certificate of the judge, chief justice or the presiding magistrate, that the attestation is in due form. This is founded upon the supposition that the court, whose proceedings are to be thus authenticated, is so constituted as to admit of such officers; and the act has wisely left the records of magistrates who may be vested with limited judicial authority, varying in its objects and extent in every State, to be governed by the laws of the State into which they may be introduced for the purpose of being carried into effect. Being left unprovided for by the constitution or laws of the United States, they stand upon no better footing than foreign judgments, being not more than *prima facie* evidence of debt, and liable to be defeated in their operation, under the plea of *nil debet*, as other foreign judgments are."[3] In Connecticut, a justice's judgment rendered in "those States where justices of the peace hold

[1] State *v.* Candler, 3 Hawks (N. C.), 393.

[2] Robinson *v.* Prescott, 4 N. H. 450; Mahurin *v.* Bickford, 6 id. 567.

[3] Warren *v.* Flagg, 2 Pick. (Mass.) 448. Whether this is the law in Indiana, *quere*. See Cone *v.* Cotton, 2 Blackf. (Ind.) 82.

courts of record," has been held within the act of congress, and not re-examinable when properly authenticated.[1] In Vermont the same doctrine prevailed formerly as in New Hampshire and Massachusetts, viz., that the justices' judgments of neighboring States generally, were not contemplated by the act of congress and the constitution, and consequently were re-examinable upon the merits when sued upon like foreign judgments.[2] But more recently it has been held otherwise in regard to the judgment of a justice, "where the law requires him to keep records."[3] In Kentucky, it seems that a judgment of an Indiana justice of the peace is within the constitution and the act of congress.[4]

In Ohio, the doctrine is, that the mode of certifying the judgments of justices of the peace has not been provided for by the act of congress; but when duly proved in the common-law mode they are within the provisions of the constitution, entitled to "full faith and credit," and not subject to re-examination.[5] So also, it seems, in New York.[6] A decree of the court of chancery has been held within the constitution and act of congress.[7]

Sec. 249. Instances in which Foreign Judgment may be Avoided.

A foreign judgment may always be avoided upon any ground upon which a domestic judgment could be avoided, and where upon its face it does not appear to be final and conclusive as an estoppel in the country in which it was

[1] Bissell *v.* Edwards, 5 Day (Conn.), 363.

[2] King *v.* Van Gilder, 1 D. Chip. (Vt.) 59.

[3] Starkweather *v.* Loomis, 2 Vt. 573; Blodget *v.* Jordan, 6 id. 580.

[4] Scott *v.* Cleveland, 3 Mon. (Ky.) 87.

[5] Silver Lake Bank *v.* Harding, 5 Ham. (Ohio), 545; Kuhn *v.* Miller, id. 127.

[6] Thomas *v.* Robinson, 3 Wend. (N. Y.) 263; Sheldon *v.* Hopkins, 7 id. 435; Stockwell *v.* Coleman, 10 Ohio St. 33.

[7] Barbour *v.* Watts, 1 Marsh. (Ky.) 292, 293; Tarlton *v.* Briscoe, 1 id. 67. So also, in Louisiana, Scott *v.* Blanchard, 8 Mart. (La.) 303. In Tennessee, Hunt *v.* Lyle, 8 Yerg. (Tenn.) 142; 6 id. 412. In South Carolina, Miller *v.* Miller, 1 Bailey (S. C.), 242. In New York, a regular decree of *divorce*, by the superior court of Connecticut, has been viewed as standing upon the same footing. Bradshaw *v.* Heath, 13 Wend. (N. Y.) 407. In Maine, Harding *v.* Alden, 9 Me. 149.

rendered it will not be an estoppel in a foreign jurisdiction.[1] So a foreign judgment may be impeached upon an error of law apparent upon its face, whether it was set up as a ground of action, or in defense thereto.[2] But the error of law must be very clear.[3] So too they may be avoided if founded upon fraud, or rendered by a court which did not have jurisdiction,[4] or if the defendant was not served with process in the original action.[5] Thus, where the summons in the case was served by nailing it up on the door of the court-house, it was held that although this might have been a legal service in the jurisdiction in which the judgment was rendered, it was not sufficient to give validity to the judgment outside that jurisdiction. A contrary doctrine would not only be inconsistent with every principle of justice, but would be exceedingly dangerous. In a case before cited,[6] it was attempted to maintain the judgment by the local law of the island of Tobago, where it was rendered, which, in terms, authorized proceedings of a similar nature against persons *absent from the island.* Lord Ellenborough, who delivered the opinion,[7] said: "*Absent from the island* must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the court out of which the process issued; and as nothing of that sort was in proof here to show that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an assumpsit upon the judgment so obtained." The proposition that a judgment pronounced without jurisdiction is void, and can be no evidence whatever, is univer-

[1] Plummer *v.* Woodburne, 4 B. & C. 636; Smith *v.* Nicholls, 5 New Cases, 222; Obiohui *v.* Bligh, 8 Bing. 351.

[2] Mouelli *v.* Rossi, 2 B. & Ad. 757; Buchanan *v.* Rucker, 1 Camp. 67.

[3] Alivan *v.* Furnival, 1 C. M. & R. 293; Arnot *v.* Redfern, 2 C. & P. 88; Becquet *v.* McCarthy, 2 B. & Ad. 957.

[4] Price *v.* Deerhurst, 8 Sim. 279.

[5] Buchanan *v.* Rucker, 1 Camp. 67; Mees *v.* Thulluson, 20 Eng. L. & Eq. 465; Frankland *v.* MacGusty, 1 Knapp, 274; Ferguson *v.* Mahon, 11 Ad. & El., 179; Houlditch *v.* Donegal, 8 Bligh, 338; and the defendant may show that he was not served, Redus *v.* Burnett, 59 Tex. 376; Lampton's Succession, 35 La An. 418; Mitchell *v.* Ferriss, 5 Del. 34.

[6] Buchanan *v.* Rucker, *ante.*

[7] 9 East, 192.

sally acknowledged, not only in respect to foreign judgments, but to judgments as among the neighboring States, as well as to domestic judgments. And it makes no difference whether the judgment is sought to be enforced directly by action, or whether it comes incidentally in question. The application of this doctrine to foreign judgments, and to judgments in the several States will be found recognized in nearly all the cases. So far as the general principle is concerned, there is no difficulty; but the point of embarrassment usually lies in determining whether the court had jurisdiction in fact, and in ascertaining how far that jurisdiction extended in the particular instance. This will lead to the inquiry, among others, *was the court properly constituted?* Such inquiry is always allowable when a foreign judgment, or the judgment of a neighboring State comes in question;[1] but to what length is not very clearly defined. In a Pennsylvania[2] case an objection was raised as to the jurisdiction of a court, acting at St. Domingo, which was said not to have been derived from the proper authority; and it was held sufficient that the court was one *de facto*, deriving its authority from those in whom the power of the country was for the time being vested; and, therefore, it was held to have the jurisdiction of a legitimate court.[3] If the origin of the foreign court does not appear, it seems that it will be presumed legitimate; but where the source of its authority is stated, the tribunal before which its judgment is produced will examine it; and if it be contrary to the usual mode of constituting courts, it shifts the *onus probandi* upon the party who would sustain the judgment, and it will then be for him to establish that the foreign court was properly organized.[4] Another important inquiry is, *has the foreign court, or the court of the neighboring State, as the case may be, complied with the local law, so as to have enabled it to acquire jurisdiction over what it has*

[1] Rose *v.* Himely, 4 Cranch (U. S.), 241; Cherriot *v.* Foussat, 3 Binn. (Penn.) 220; Moren *v.* Killibrew, 2 Yerg. (Tenn.) 376, 379, 380; The Nueva Anna and Liebre, 6 Wheat. (U. S.) 193.

[2] Bank of North America *v.* McCall, 4 Binn. (Penn.) 371.

[3] Ingram *v.* Cocke, 1 Overt. (Tenn.) 22. See per Best, C. J., Yrisarri *v.* Clement, 2 C. & P. 223.

[4] Snell *v.* Faussatt, 1 Wash. (U. S. C. C.) 271.

assumed to decide? That this inquiry is admissible, results necessarily from the legal truism, that a judgment void where it is rendered is void everywhere. It has indeed been said, in a general way, in reference to admiralty proceedings, that a foreign court, so far as its jurisdiction depends upon municipal rules, must judge whether it has jurisdiction or not, and that such decision must be respected.[1] But if, by our obligation to *respect* decisions of this character, it is intended to affirm that we are to regard them as conclusive, the doctrine carried out and applied to foreign courts deriving their jurisdiction under local regulations, which obviously lead to an absurdity not to be countenanced; for every court either expressly or by implication passes upon the question of its own jurisdiction whenever it renders judgment; and to say that because it has so passed upon it, there shall be no further examination into the point, would be paying to foreign judgments a more deferential regard than is allowed even to domestic judgments.[2] The court held a Missouri judgment, rendered upon attachment, void, because, among other things, the return of the officer to the attachment did not comply with the local statute.[3] A foreign judgment is conclusive, so far as to preclude a retrial upon the merits.[4] But the defendant may show that the foreign court had not jurisdiction of the subject-matter of the suit, or that the defendant was not served with process, or that the judgment was fraudulently obtained.[5] It may also be shown that the judgment was afterward reversed or vacated by the court rendering it, even where that was done after issue joined upon it in this State.[6] A question not unfrequently arises under this

[1] Rose *v.* Himely, 4 Cranch (U. S.), 276; Cherriot *v.* Foussat, 3 Binn. (Penn.) 255.

[2] Earthman *v.* Jones, 4 Yerg. (Tenn.) 484.

[3] Earthman *v.* Jones, 4 Yerg. (Tenn.) 484. See also Cone *v.* Cotton, 2 Blackf. (Ind.) 82; Buchanan *v.* Rucker, 9 East, 192; Moren *v.* Killibrew, 2 Yerg. (Tenn.) 376; Elliot *v.* Piersol, 1 Pet. (U. S.) 340, 341; Thompson *v.* Tolmie, 2 Pet. (U. S.) 157; Fisher *v.* Harnden, 1 Paine (U. S.), 155.

[4] Lozier *v.* Westcott, 26 N. Y. 146.

[5] Henderson *v.* Henderson, 6 C. B. 288; Ferguson *v.* Mahen, 11 Ad. & El. 179.

[6] Kinsey *v.* Ford, 38 Barb. (N. Y.) 195. In Jarvis *v.* Sewell, 40 Barb. (N. Y.) 449, the mode of proving a judgment or decree of the privy council in England, which is not a court of record, and has neither

branch of the inquiry: What is the presumption where a foreign judgment, or the judgment of a neighboring State, is introduced, respecting its jurisdiction, as depending upon its compliance or non-compliance with the local law? In an English case,[1] a suit was instituted in England to recover damages awarded by the vice-admiralty of the island of Malta; and it was held that the decree, in order to be evidence of indebtedness, must show expressly, and not by mere inference, that the defendant was brought within the jurisdiction of the vice-admiralty court, and that the court where the suit was pending would not presume it." So also, in a New Hampshire case,[2] where debt was brought, in New Hampshire, upon a judgment of the common pleas of Rhode Island, it was held, that inasmuch as it did not appear by the record that the defendant had personal notice of the suit, or appeared to the action in the court where the judgment was pronounced, the judgment must be regarded as obtained without jurisdiction; for these facts would not be presumed. In a New York case,[3] the plaintiff, Mary Bradshaw, brought ejectment, in New York, for dower, and in answer to proof on the part of the defendant, that the plaintiff previous to the marriage in virtue of which she claimed dower, was a married woman, and that her first husband was still alive—the plaintiff produced a record of the superior court of Connecticut, containing a sentence of divorce, on her petition, from her first husband. The petition, as stated in the record, alleged that the first husband had deserted the petitioner, and had ever since been to parts unknown. No appearance on the part of the husband was shown by the record, nor did it state that he was served with process, or had notice of the proceeding; but, on the contrary, the adjudication was alleged to have been made on hearing "the plea and evidence produced by the plaintiff." The defendant proved that the first husband, at the time of the presen-

clerk nor seal, is considered and passed upon, in an action upon a bond for costs given on appeal from a Canada judgment.

[1] Umbragio *v.* Bligh, 8 Bing. 335.

[2] Thurber *v.* Blackburn, 1 N. H. 242.

[3] Bradshaw *v.* Heath, 13 Wend. (N. Y.) 407.

tation of the petition, and of the granting of the divorce, was an inhabitant of the State of New York; and the court held, that although the record of a court of competent jurisdiction of another State, granting a divorce, is conclusive, and entitled to full faith and credit, yet it is so, only as to matters clearly and distinctly stated in it, and not as to those which are merely inferable by argument from the judgment; that in the particular case, the record of divorce was no evidence of the jurisdiction of the court over the person of the defendant in those proceedings, because no fact was stated giving jurisdiction; and if jurisdiction was inferable at all, it was only so by argument from the judgment; and consequently that the presumption, under the circumstances, was against the validity of the decree.[1] In a Kentucky case,[2] the rule on this subject with regard to the ordinary judgments of neighboring States, is laid down as follows: "That when the judgment or decree of a sister State is produced, rendered by one of its tribunals, we must presume *that* tribunal had jurisdiction and authority," and the *onus* of impeaching it is thus thrown on him against whom it is urged. The presumption as to jurisdiction may be overcome by proof of extrinsic matters which show that the court did not in fact have jurisdiction.[3] A distinction is taken between judgments of courts of *limited and special jurisdiction*, and those of *general jurisdiction*. But what is a court of limited and special jurisdiction, as contradistinguished from a court of general jurisdiction, and in what way is the tribunal before which a judgment of a foreign court is produced to determine whether such court belongs to the one or the other of these classes? These and other points suggest themselves, when the mind is brought to bear upon the subject, and without attempting any thing like a solution of them, we shall content ourselves with using the terms mentioned as they are used in the books. In respect to courts of *general jurisdiction*, then the rule is, that they are presumed to

[1] Harding *v.* Alden, 9 Me. 140; Harrison *v.* Harrison, 19 Ala. 499; Hull *v.* Hull, 2 Strobh. Eq. (S. C.) 174.

[2] Scott *v.* Coleman, 5 Litt. (Ky.) 350.

[3] O'Rourke *v.* Chicago, &c., R. R. Co., 55 Iowa, 332.

have had jurisdiction until the contrary clearly appears.[1] This rule has been applied, in New York, to the judgments of *courts of common pleas* and *county courts* of neighboring States. Thus, in an early case,[2] debt was brought on a common plea judgment of Massachusetts; the defendant plead that at the time of the commencement of the suit in which the judgment was obtained, and ever since, he had been, and still was, a resident in Schenectady, in the State of New York. To this there was a general demurrer, which the court sustained, on the ground that the defendant had not expressly negatived the idea that he appeared to the suit, and thus conferred jurisdiction. "Every presumption," says SUTHERLAND, J., "is in favor of the jurisdiction of the court. The record is *prima facie* evidence of it; and will be held conclusive, until clearly and explicitly disproved."[3]

But in respect to courts of *limited and special jurisdiction*, the rule is different; nothing is presumed in their favor so far as it respects jurisdiction; and the party seeking to avail himself of their judgments, must show affirmatively that they had jurisdiction.[4] Accordingly, in New York, where an action was brought on a justice's judgment of a neighboring State, it was held that it could not be sustained until the statute creating and organizing the court was produced and proved, that it might be seen whether the justice had jurisdiction or not; for the courts of one State will not take judicial notice of the statutes of another.[5]

Now, by statute of New York, a transcript from the docket of a justice of an *adjoining* State is made presump-

[1] See Mills *v.* Martin, 19 Johns. (N. Y.) 33; Thomas *v.* Robinson, 3 Wend. (N. Y.) 267; 12 N. Y. 156.

[2] Shumway *v.* Stillman, 4 Cow. (N. Y.) 292.

[3] Harrod *v.* Barretto, 1 Hall (N. Y.), 155. In Wheeler *v.* Raymond, 8 Cow. (N. Y.) 311, the court seem to have held similarly in respect to proceedings of a county court of Vermont, commenced under a statute of that state relating to foreign attachments. The same doctrine has been acted on in Connecticut. Smith *v.* Rhoades, 1 Day (Conn.), 168. See also Pringh *v.* Woolworth, 90 N. Y. 502.

[4] Mills *v.* Martin, 19 Johns. (N. Y.) 33; Peacock *v.* Bell, 1 Saund. 73; Kempe *v.* Kennedy, 5 Cranch (U. S.), 173; 1 Pet. (U. S. C. C.) 30; Wheeler *v.* Raymond, 8 Cow. (N. Y.) 311.

[5] Thomas *v.* Robinson, 3 Wend. (N. Y.) 267; Sheldon *v.* Hopkins, 7 id. 435.

tive evidence of the facts stated in such transcript, when authenticated in the mode prescribed in the act. The transcript, however, is liable to be controverted by evidence in all its parts relative to the validity of the judgment. In Indiana, it appeared that a *scire facias* had been issued by a justice of the peace of Ohio, and on a return of the writ "not found," judgment passed for the plaintiff, upon which action was brought in the former State; and it was held, that the judgment having been rendered without service of the writ or the return of two *nihils*, would not, on common law principles support the action; and that if the judgment was authorized by a statute of Ohio on the return of "not found," such statute must be shown by the party setting up the judgment.[1] And in regard to this class of jurisdictions it is observable generally, that where a statute prescribes a new proceeding, either unknown to the common law or contrary thereto, the statute, so far, at least, as those parts of it essential to jurisdiction are concerned, must be not only proved, but shown to have been strictly pursued, or the proceeding will be held a nullity.[2] The same has been said with regard to summary proceedings and extraordinary powers, exercised by any court under a special statute.[3]

A still further inquiry may arise, when a foreign judgment, or the judgment of a neighboring State, is produced, viz.: *What measure of jurisdiction could the sovereign power of the place where the judgment was rendered, confer upon its courts?* Considered in an international point of view, jurisdiction, to be rightfully obtained, must be founded either upon the person of the defendant being within the territory of the sovereign where the court sits, or his property being within such territory; for otherwise, there can be no sovereignty exerted, upon the known maxim, *extra territorium jus dicenti impunenon paretur*.[4] Even, therefore, should the leg-

[1] Cone *v.* Cotton, 2 Blackf. (Ind.) 82.

[2] Earthman *v.* Jones, 2 Yerg. (Tenn.) 493.

[3] Thatcher *v.* Powell, 5 Wheat. (U. S.) 119; Holmes *v.* Broughton, 10 Wend. (N. Y.) 75; Collet *v.* Keith, 2 East, 221; Walker *v.* Maxwell, 1 Mass. 103.

[4] Story's Confl. of Laws, 450; 3 Dig. Lib. 2, tit. 1, ch. 20; 1 Boullenois' Pr. Gen. 1, 2, pp. 2, 3; Vattel, b. 2, ch. 8, § 84.

istature of a nation or of a neighboring State expressly grant jurisdiction to its courts over persons or property not within its territory, such grant would be treated elsewhere as a mere attempt at usurpation, and all judicial proceedings in virtue of it, held utterly void for every purpose.[1]

A person, however, though a citizen of another State or country, when he comes within the territory of a particular sovereignty, contracts a sort of temporary allegiance to it, and may justly be subjected to its process, and bound personally by the judgment of its courts. And whether jurisdiction is founded upon the person being within the territory, or the *property* being there, the judgment will be deemed valid, so far as that jurisdiction could legitimately extend; but no farther. Thus, a very common course, in many of the United States, and in many other countries, is to proceed against non-residents by an arrest or attachment of their property within the territory. Judgment obtained upon process of this kind will generally bind the property so arrested or attached; for to that extent the court has or can have jurisdiction. But such judgment will not be regarded by neighboring States or other nations as evidence of indebtedness or as operative in any measure *in personam;* and for this very obvious reason, viz., that except so far as the property attached is concerned, there is and can be no jurisdiction, no power of adjudication.[2]

[1] See Buchanan *v.* Rucker, *ante;* also, Picquet *v.* Swan, 5 Mas. (U. S.) 35; Story's Confl. of Laws, 450, 451; Kilburn *v.* Woodworth, 5 Johns. (N. Y.) 37; Robinson *v.* Ward, 8 id. 86; Borden *v.* Fitch, 15 id. 121; Hall *v.* Williams, 6 Pick. (Mass.) 232; Flower *v.* Parker, 3 Mas. (U. S.) 251; Bartlett *v.* Knight, 1 Mass. 401; Miller *v.* Miller, 1 Bailey (S. C.), 242; Earthman *v.* Jones, 2 Yerg. (Tenn.) 484; Moren *v.* Killibrew, id. 376; Rogers *v.* Coleman, Hardin (Ky.), 413; St. Albans *v.* Bush, 4 Vt. 58. Whether the doctrine applies to decrees of divorce obtained in one State strictly according to the local law, and sought to be used in another, *quere.* See Harding *v.* Alden, 9 Me. 140; Bradshaw *v.* Heath, 13 Wend. (N. Y.) 407. In Harding *v.* Alden, *ante,* the supreme court of Maine seemed to think that it did not, so far as the mere question of conjugal rights was concerned, they being the subject of a suit in the nature of a proceeding *in rem;* but otherwise, if the decree was sought to be enforced as to alimony.

[2] Picquet *v.* Swan, *ante;* Story's Confl. of Laws, 461; Kilburn *v.* Woodworth, 5 Johns. (N. Y.) 37; Pawling *v.* Bird, 13 id. 192; Sar-

Where the summons is served upon a non-resident by publication, if the defendant has property in the State, the judgment is limited in its effect to such property in the State, where the judgment is obtained.[1] Without service of process the judgment is of no validity out of the State.[2]

So as to judgments or decrees in other cases, obtained against persons resident abroad without notice to them, and an opportunity afforded of defending.[3] And in order that the judgment under these circumstances may be rendered binding upon the defendant *in personam*, the notice must be *personally served* upon him. This will be found sustained by all the cases; and where notice was given by publication in the newspapers, as is frequently done in certain chancery proceedings in several of the States, to bring in some of the parties who were absent, it was held, that a decree, pursuant to notice of that character, as against such absent defendants, was no evidence of indebtness.[4] The notice must, moreover, be served upon the defendant while he is within the jurisdiction of the sovereignty under which the court acts; for no sovereign has a just right to issue such notice to

geant on Attachments, 112, 113, 114, *et seq.*; M'Clenachan *v.* M'Carty, 1 Dall. (Penn.) 375; Phelps *v.* Holker, id. 264; Robinson *v.* Ward, 8 Johns. (N. Y.) 86; Borden *v.* Fitch, 15 id. 121; Hall *v.* Williams, 6 Pick. (Mass.) 232; Betts *v.* Death, Addis. (Penn.) 265; Fenton *v.* Garlick, 8 Johns. (N. Y.) 194, 197; Flower *v.* Parker, 3 Mas. (U. S.) 251; Wilson *v.* Graham, 4 Wash. (U. S. C. C.) 53, 57; Bissell *v.* Briggs, 9 Mass. 462; Kibbe *v.* Kibbe, Kirby (Conn.), 119; Dennison *v.* Hyde, 6 Conn. 508; Aldrich *v.* Kinney, 4 id. 380, 387; Earthman *v* Jones, 2 Yerg. (Tenn.) 484; Hoxie *v.* Wright, 2 Vt. 263; Rogers *v.* Coleman, Hardin (Ky.), 413; Newton *v.* Newell, 10 Pick. (Mass.) 470; Starbuck *v.* Murray, 5 Wend. (N. Y.) 148; Holbrook *v.* Murray, id. 161; Bradshaw *v.* Heath, id. 407; Bates *v.* Delavan, 5 Paige (N. Y.), 299, 305; Armstrong *v.* Harshaw, 1 Dev. (N. C.) 188.

[1] Force *v.* Gower, 23 How. Pr. (N. Y.) 294.

[2] Oakley *v.* Aspinwall, 4 N. Y. 521.

[3] Bellows *v.* Ingham, 2 Vt. 576, 577; Woodward *v* Tremere, 6 Pick. (Mass.) 354; Newell, *v.* Newton, 10 id. 472; Bartlett *v.* Knight, 1 Mass. 401; Cone *v.* Cotton, 2 Blackf. (Ind.) 82; Moren *v.* Killibrew, 2 Yerg. (Tenn.) 376; Thurber *v.* Blackbourne, 1 N. H. 242; Bradshaw *v.* Heath, 13 Wend. (N. Y.) 407; Hart *v.* Lodwick, 8 La. 164; Spencer *v.* Sloo, id. 290.

[4] Miller *v.* Miller, 1 Bailey (S. C.), 242. See Moren *v.* Killibrew, 2 Yerg. (Tenn.) 376; Cone *v.* Cotton, 2 Blackf. (Ind.) 82.

the citizen of another State or country, and thereby draw the party from his own proper forum *ad alium examen*.[1] But if the party, in any of these instances, chooses to appear and contest the merits, thereby waiving his personal immunity, and submitting to the jurisdiction of the court, the judgment would then doubtless bind him personally, and be entitled to the same measure of respect with the judgment of a neighboring State or a foreign country, as the case may be, obtained in the ordinary mode.[2] However, it has been held otherwise in cases of foreign attachments, where the defendant has merely appeared to protect his property.[3]

[1] Picquet *v.* Swan, *supra;* Dunn *v.* Dunn, 4 Paige, 425; Fenton *v.* Garlick, 8 Johns. 194, 197; Flower *v.* Parker, 3 Mas. (U. S.) 251; Wilson *v.* Graham, 4 Wash. (U. S. C. C.) 53; Woodward *v.* Tremere, 6 Pick. (Mass.) 354; Harrod *v.* Barretto, 1 Hall (N. Y.), 155; Kilburn *v.* Woodworth, 5 Johns. (N. Y.) 161; Arnold *v.* Toutelott, 13 Pick. (Mass.) 172; Adam *v.* Rowe, 11 Me. 98.

[2] Picquet *v.* Swan, 5 Mas. (U. S.) 43; Flower *v.* Parker, 3 id. 251; Hall *v.* Williams, 6 Pick. (Mass.) 237; Shumway *v.* Stillman, 6 Wend. (N. Y.) 447; Starbuck *v.* Murray, 5 id. 148; Hoxie *v.* Wright, 2 Vt. 262; Bellows *v.* Ingham, id. 575; Mayhew *v.* Thatcher, 6 Wheat. (U. S.) 129; Wheeler *v.* Raymond, 8 Cow. (N. Y.) 311; Price *v.* Higgins, 1 Litt. (Ky.) 276; Moore *v.* Spackman, 12 S. & R. (Penn.) 287.

[3] Bissel *v.* Briggs, 9 Mass. 469; Pawling *v.* Bird, 13 Johns. (N. Y.) 207. But in Starbuck *v.* Murray, 5 Wend. (N.Y.) 159, Marcy, J.; delivering the opinion, after referring to the above case of Bissell *v.* Briggs, lays down the law as follows: "The court would not, in such a case, I concede, have jurisdiction over the defendant's person for any other but the direct objects of the proceedings; and so far as those were concerned, he would be subjected to the authority of the court. If a citizen of one State should go into another to claim property seized on attachment, and subject the attaching creditors to costs and expenses, which in the due course of the proceedings, should be adjudged to them by a court of competent authority, will it be pretended that he could resist the payment of these costs on the ground that he was not subject to the jurisdiction of the court? For all the fair and direct objects of the suit, he was within its jurisdiction. So if the proceedings were not *in rem*, but the property of the defendant was attached to compel him to appear and answer to proceedings *in personam*, and he did in fact appear and litigate the cause with the plaintiff, he could not be heard to question the jurisdiction of the court over his person. I do not think Chief Justice Parsons intended to say more than this, that when a court had the jurisdiction of a defendant for one purpose, it could not legally bind him by a judgment or sentence in a distinct and different manner." See Moore *v.* Spackman, 12 S. & R. (Penn.) 287.

If the party, by an act of lawless violence on the part of a few citizens of a particular State, is seized and brought within its jurisdiction from another State, it has been held that he may, nevertheless, be subjected to the jurisdiction of the courts of the State into which he is so brought.[1]

Where the record of a foreign judgment states that the defendant appeared by attorney, this will be *prima facie* evidence of the fact, and the attorney will be presumed to have been regularly constituted.[2]

In an English case, the validity of judgments rendered against persons, who were non-residents, and had no actual notice of the suit, and did not appear and answer the same, came before the court of common pleas of England, upon a Scottish judgment rendered against a Scottish absentee, upon due attachment of his heritable property in Scotland, and due proclamation by what is there technically called *horning*, and a judgment by default for non-appearance. An action of debt was brought on the judgment, and the question was, whether it was void or not. It was held, that it was valid. This was partly the result of the articles of union between Scotland and England, and partly of the

[1] State *v.* Smith, 1 Bailey (S. C.), 283; Id. 290, note *a*.

[2] Malony *v.* Gibbons, 2 Camp. 502. See Robinson *v.* Eaton, 1 T. R 62; Tipton *v.* Mayfield, 10 La. 189. So, with respect to judgments as among the neighboring States. Field *v.* Gibbs, 1 Pet. (U.S.C.C) 155; Hall *v.* Williams, 6 Pick. (Mass.) 232; Aldrich *v.* Kinney, 4 Conn. 380; Starbuck *v.* Murray, 5 Wend. (N. Y) 148; Hoxie *v* Wright, 2 Vt. 263; Shumway *v.* Stillman, 6 Wend. (N. Y.) 447. But as we have already seen, some diversity of opinion exists, whether this statement of appearance in the record of a neighboring State may be contradicted. In Field *v.* Gibbs, 1 Pet. (U. S. C. C.) 155, it was held it could not, on the general principle forbidding the impeachment of records. So also, in Vermont, Hoxie *v.* Wright, 2 Vt. 263, 268; and in Massachusetts, to a qualified extent only, however. Hall *v.* Williams, 6 Pick. (Mass.) 232. But in New York and Connecticut, the direct contrary has been held; and in the former State the broad ground is taken that every fact stated in the record upon which jurisdiction depends, may be controverted. Starbuck *v.* Murray, 5 Wend. 148; Aldrich *v.* Kinney, 4 Conn. 380; Barber *v.* Winslow, 12 Wend. (N. Y) 102; Shumway *v.* Stillman, 6 id. 447; Bradshaw *v.* Heath, 13 Wend. (N. Y.) 407, 418. If the defendant appears and pleads, though his appearance be entered informally on the record, the judgment will bind him. Bank of Middletown *v.* Huntington, 13 Abb. Pr. (N. Y.) 402.

recognition of such practice, as valid, by a British act of parliament; and partly also of the fact that the judgment was against a Scottish subject. BEST, J., who delivered the opinion of the court, said: "A natural born subject of any country, quitting that country, but leaving property under the protection of its laws, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation. The deceased, before he left his native country, acknowledged under his hand, that he owed the debts; he was under a moral obligation to discharge those debts as soon as he could." After adverting to the case of Buchanan *v.* Rucker, and some others, he added: "To be sure, if attachments, issued against persons who were never within the jurisdiction of the court issuing them, could be supported and confirmed in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the right of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it."[1]

Thus far, to avoid unnecessary prolixity, we have treated of foreign judgments and judgments as among the neighboring States of the Union, without discriminating very particularly, except in a few instances, between the two classes; for, in regard to the matters relating to jurisdiction which we have noticed, there is seldom a discernible shade of difference between them. The latter class, however, owing to the provisions of the act of congress and the constitution, before referred to, may, perhaps, with respect to some other particulars under this head, claim a distinct and separate consideration.

[1] Douglass *v.* Forrest, 4 Bing. 686. See also Meeus *v.* Thelluson, 20 Eng. L. & Eq. 465; Gould *v* Webb, 82 Eng. C. L. 932; 76 id. 787.

Where the legislature of a State has undertaken to confer upon its courts the power of exercising jurisdiction over the persons of the citizens of other States, who have in no sense subjected themselves to its authority, nor been within its territory, we have seen that all judgments rendered in pursuance of such regulations will be held utterly void. The legislature, the principal, having no jurisdiction, can confer none upon its agents, the courts.[1] But, in respect to its own resident citizens, it is undoubtedly competent for the legislature to prescribe such mode of judicial proceeding as it may deem proper; to direct the manner of serving process, the notice which shall be given to defendants, and to declare the effect of a judgment rendered in pursuance of such notice.[2] Should a State, then, adopt absurd or unjust provisions in this respect, and give full jurisdiction to its courts over resident citizens without requiring any thing more than a constructive notice to them; should it allow, for instance, the rendition of a judgment, after service of process upon the property of the defendant, or by publication of notice in the newspapers, or by affixing the same against the door of a court-house or church, and declare such judgment final and conclusive, what would be its effect in a neighboring State? If it were a strictly *foreign judgment*, it might, perhaps, be treated as a nullity, provided there was clearly no appearance, and no opportunity of defending; but such is not the case. It is now settled, by as strong and unbroken a current of authority as can be brought to bear in favor of any position, that the several States in this respect are not foreign to each other; that the effect to which the "acts, records and judicial proceedings" of one State are entitled in the courts of a neighboring State, does not depend upon volition or comity as among the respective members of the Union, but is defined and peremptorily enforced by the paramount sovereignty of the Federal government. Many of the decisions seem at a first glance to maintain the doctrine that judgments obtained without personal notice to the

[1] Per CATRON, J., Earthman *v.* Jones, 2 Yerg. (Tenn.) 484.

[2] Per WILLIAMS, J., Beech *v.* Abbott, 6 Vt. 591. See also, Douglas *v.* Forrest, 4 Bing. 686, per BEST, C. J.

defendant, and without any opportunity afforded him of contesting the plaintiff's claim, would not come within the general rule, but constitute an exception to the provisions of the constitution and the act of congress.[1] But on examination it will be seen that these authorities all relate to cases where the person against whom the judgment was pronounced was a resident citizen of another State when the suit was commenced, and had contracted no allegiance to the sovereignty where the court sat, nor given it any power over him. They proceeded upon the total absence of jurisdiction in the court not only, but the sovereignty under which the court acted and the absolute imposibility of acquiring jurisdiction without the party's consent in such cases. The question, therefore, as to judgments rendered in accordance with the local law by a State court against its *resident citizens*, over whom it has exclusive sovereignty, did not arise and was not discussed.[2] In a New Hampshire case, BELL, J., delivering the opinion of the court, lays down a position which, if correct, would indiscriminately exempt *all* judgments of other States from the operation of the act of congress and the constitution, provided they were obtained without personal notice to the defendant and an opportunity afforded him of defending. "The words *records and judicial proceedings*," he says, "are words of definite meaning at common law, and by settled legal rules in the construction of statutes they are to have the same meaning attached to them when used in this statute. The common law never recognized judicial proceedings as foreign *judgments*, unless rendered by a court of record upon personal notice given to the defendant, or his appearance to the action. Without

[1] Aldrich *v.* Kinney, 4 Conn. 380; Kibbe *v.* Kibbe, Kirby (Conn.), 119; Robinson *v.* Ward, 8 Johns. (N. Y.) 86; Fenton *v.* Garlick, id. 194; Kilburn *v.* Woodworth, 5 id. 37; Borden *v.* Fitch, 15 id. 121; Pawling *v.* Bird, 13 id. 192; Starbuck *v.* Murray, 5 Wend. (N. Y.) 148; Holbrook *v.* Murray, id. 161; Shumway *v.* Stillman, 6 id. 447; Wheeler *v.* Raymond, 8 Cow. (N. Y.) 311; Andrews *v.* Montgomery, 19 Johns. (N. Y.) 162; Bartlett *v.* Knight, 1 Mass. 401; Jacobs *v.* Hull, 12 id. 25; Bissell *v.* Briggs, 9 id. 462; Hall *v.* Williams, 6 Pick. (Mass.) 232; Woodward *v.* Tremere, id. 354; Dennison *v.* Hyde, 6 Conn. 508; Rogers *v.* Coleman, Hardin (Ky.), 413.

[2] Thurber *v.* Blackbourne, 1 N. H. 242.

these requisites, such foreign judgment is a mere nullity, and does not afford even *prima facie* evidence of a debt.[1] The judicial proceedings or judgments contemplated by the act of 1790, were, therefore, not judgments rendered without notice to the defendant or appearance to the action, but judgments which were recognized and enforced at common law as foreign judgments. Judgments of the courts of record of one State, rendered without notice or appearance of the defendant, when sued in the courts of another State, are therefore not affected by the statute of 1790, but remain, as at common law, mere nullities, unless within the jurisdiction where they were rendered.[2] A similar doctrine has been acted upon in Indiana. Thus, in an action on a Kentucky judgment[3] the defendant pleaded that the judgment was obtained against him on a recognizance of special bail without any notice having been served on him, and without any *ca. sa.* having been issued against his principal. To this plea there was a general demurrer, which was overruled and judgment given for the defendant, because no *ca. sa.* had gone. The court, after observing that the judgment of a neighboring State may be impeached for fraud, or for want of jurisdiction, say: "The cause under consideration does not belong to either of those classes of cases. On the one hand, it is a case to which, for the want of personal notice, the act of congress giving to the judgment of one State when sued upon in another, the same conclusive effect as it has where rendered, does not properly apply. That act is based upon the principle that the merits of a cause once fairly and fully tried and determined in one State should not be subject to the subsequent investigations and decisions of the courts of other States; but a judgment rendered, like the one in question, in the absence of the defendant, and without any personal notice to him of the suit, cannot be said to have been thus fairly obtained, and consequently does not come within the principle of the act of congress. On the other

[1] Fisher *v.* Lane, 3 Wilson, 303; Buchanan *v.* Rucker, 9 East, 192.

[2] And see Hall *v* Williams, 10 Me. 278.

[3] Holt *v.* Alloway, 2 Blackf. (Ind.) 108.

hand, although the defendant had no personal notice of the original suit, yet it does not appear but that he was a resident of the State of Kentucky when the action was commenced, and that the judgment was recovered in conformity with the laws of that State, we would not, it is conceived, be warranted in determining that the court had no jurisdiction. We are, therefore, of opinion, that according to the facts on record, the judgment in this case must be viewed not as conclusive, for the want of personal notice; not as absolutely void, since the defendant must be presumed a resident of Kentucky when the suit was commenced, and amenable to its laws; but we must consider it as a *foreign* judgment and *prima facie* evidence of the debt. It is *per se* a cause of action, and may be declared on as in the present case without setting forth the original demand. Its justice, however, is subject to be impeached; and it may be shown to have been unduly or irregularly obtained.[1] Notwithstanding some respectable opinions to the contrary, it may be said that in order to give the constitution and act of congress their legitimate effect, both principal and authority require that the judgment of a neighboring State should be treated in all respects as though the court before which it is brought were sitting and acting under the laws of the State where it was rendered.[2] If it would be conclusive there, it should be held equally so in every other State. An exception to the generality of this proposition might very properly be allowed where the local law, in virtue of which the court rendering the judgment proceeded, infringed upon the sovereignty of other States with regard to their own citizens; but thus qualified, it will be found to be fully sustained.[3]

[1] See Cone *v.* Cotton, 2 Blackf. (Ind.) 82; Elliott *v.* Ray, id. 31.

[2] Hinton *v.* Townes, 1 Hill (N. Y.), 439; Hunt *v.* Lyle, 8 Yerg. (Tenn.) 142.

[3] Glenn *v.* Williams, 60 Md. 98; Allison *v.* Chapman, 19 Fed. Rep. 488; Clark *v.* Child, 136 Mass. 844. Judgments of other States have no extra territorial force *as* judgments. Elizabeth Savings Inst. *v.* Gerber, 34 N. J. Eq. 130.

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